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No. 14052

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SYMNS GROCER CO., and IDAHO WHOLE-
SALE GROCERY CO.,
Respondents.

Transcript of Record

Petition for Enforcement of Order of the
National Labor Relations Board

FILED

DEC 30 1953

PAUL P. O'BRIEN
CLERK

No. 14052

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Court of Appeals
for the Ninth Circuit

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Petitioner,

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[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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GENERAL COUNSEL'S EXHIBIT No. 1-A

Form NLRB-501 (12-49)

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No. 19-CA-481. Date filed: 4-2-51. Compliance Status checked by 6-30-51 NM.

Important—Read Carefully: Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an original and four copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer against whom charge is brought: Symns Grocer Company, Idaho Falls, Idaho.

Number of workers employed: Approximately 6.

Nature of employer's business: Wholesale grocery.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3)-(5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the charge:

In that the Company through its officers and agents on or about March 1, 1951 took the position that the undersigned union had no members at the company's Idaho Falls operation, and therefore did not represent the employees, and refused to bargain with the undersigned union which is the Certified bargaining agent of the Company's employees, until an agreement was reached between another Local union in Salt Lake City, Utah in regards to the Company's Salt Lake City operations. On or about March 16, 1951 the employees at the Idaho Falls, Idaho operation went on strike to enforce their demands that the Company bargain with the undersigned union in regards to their rates of pay and other working conditions, and the Company has replaced these striking employees with strike breakers all in violation of Section 8 (a) (1), (3) and (5) of the Labor Management Relations Act of 1947.

3. Full name of labor organization, including local name and number, or person filing charge: Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 983, A.F. of L.

4. Address: 456 North Arthur, Pocatello, Idaho. Telephone No. 4349.

5. Full name of national or international labor organization of which it is an affiliate or constituent unit: International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers.

* * * * *

7. Declaration: I declare that I have read the

above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By CLARENCE LOTT,
Secretary-Treasurer

Date: March 29, 1951.

GENERAL COUNSEL'S EXHIBIT No. 1-C
Form NLRB-501 (12-49)

United States of America
National Labor Relations Board

AMENDED CHARGE AGAINST EMPLOYER

Case No. 19-CA-481. Date filed: 4-2-51. Amended: 1-29-52. Compliance Status checked by 6-30-52 NM.

Important—Read Carefully: Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9 (f), (g) and (h) of the National Labor Relations Act.

Instructions: File an original and four copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Employer against whom charge is brought: Symns Grocer Co. and Idaho wholesale Grocery Company, Inc., Idaho Falls, Idaho.

Number of workers employed: Approx. 10.

Nature of employer's business: Wholesale grocery.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the charge:

In that the Company, through its officers and agents, refused to bargain with the undersigned Union which is the certified bargaining agent of the Company's employees and did, on or about March 1, 1951, announce a wage increase without negotiating such rate with the bargaining agent and did withdraw a retroactive wage rate granted in March 1951 from the striking employees and did refuse to reinstate Lyle Carson, Harris Ransom, Charles Graves, Reid Richey and Don Forbush, on or about April 12, 1951, when the Union requested reinstatement and offered to call off the strike and did question employees about their union affiliation and attempted by promises and threats to discourage the employees in their activities for and on behalf of the undersigned Union, all in violation of Sections 8 (a) (1) (3) and (5) of the Labor-Management Relations Act of 1947.

3. Full name of labor organization, including local name and number, or person filing charge: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 983, AFL.

4. Address: 456 North Arthur, Pocatello, Idaho.
Telephone No. 4349.

* * * * *

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By CLARENCE LOTT,
Secretary-Treasurer

GENERAL COUNSEL'S EXHIBIT No. 1-F

United States of America
Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-481

In the Matter of
SYMNS GROCER CO. and IDAHO WHOLE-
SALE GROCERY CO. and TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS UNION, LOCAL No. 983, AFL

COMPLAINT

It having been charged by Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, AFL, hereafter called the Union, that Symns Grocer Co., hereafter called Respondent Symns, and Idaho Wholesale Grocery Co., hereafter called Respondent Idaho, have engaged in and are now engaging in certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 61 Stat. 136, hereafter called the Act,

the General Counsel of the National Labor Relations Board on behalf of the Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Respondent Symns, a corporation organized and existing by virtue of the laws of the state of Utah, has its principal office at Salt Lake City, Utah. During the years 1950 and 1951 it was a multi-state enterprise engaged in the business and operation of wholesale grocery outlets. During that period it owned and operated a wholesale grocery outlet situated at Idaho Falls, Idaho, hereafter called the Idaho Store, which was an integral part of Respondent Symns' multi-state operation. This Complaint concerns the Idaho Store.

II.

Respondent Symns, in the course and conduct of its business, annually purchased and does now purchase equipment and merchandise valued in excess of \$500,000, which is shipped directly to its wholesale outlets from states other than the state of Utah. Additionally, it purchased and does now purchase large amounts of merchandise and equipment within the state of Utah which originated in states other than the state of Utah. It annually sells and ships merchandise valued in excess of \$25,000, to customers and wholesale outlets situated in states other than the state of Utah.

The Idaho Store annually and particularly during the years 1950 and 1951, sold and transported merchandise valued in excess of \$75,000 per annum to purchasers situated in states other than the state of Idaho. During the same period it purchased equipment and merchandise valued in excess of \$500,000 annually, which was shipped directly to it from points outside the state of Idaho. Also during the same period it purchased a large dollar volume of equipment and merchandise within the state of Idaho which originated in states other than the state of Idaho.

III.

Respondent Idaho is a corporation organized and existing by virtue of the laws of the state of Idaho. It is a wholly owned subsidiary of Utah Wholesale Grocery Co., a Utah corporation, hereinafter called Utah Grocery. The office and place of business of Respondent Idaho is located in Idaho Falls, Idaho, and the principal office and place of business of Utah Grocery is situated in Salt Lake City, Utah. Utah Grocery is a multi-state enterprise engaged in the business and operation of a chain of wholesale grocery outlets. Respondent Idaho is engaged in the business of operating a wholesale grocery company, and has, since its formation, been an integral part of the multi-state operation of its parent corporation, Utah Grocery.

IV.

On or about the month of July, 1950, Respondent Idaho was created for the purpose of purchasing

and it did purchase the Idaho Store from Respondent Symns, and it has at all times since that date operated the Idaho Store as the successor of Respondent Symns without interruption or substantial change in the business, method of operation, personnel, equipment or customers.

V.

Respondent Idaho in the course and conduct of its business in operating the Idaho Store has, since acquiring the Idaho Store, continued to purchase, use and sell equipment and merchandise in substantially the same dollar volume from and to sellers and purchasers situated in states other than the state of Idaho that formerly existed under the ownership of Respondent Symns set forth and described above in paragraph II.

VI.

Respondent Symns is engaged in interstate commerce within the meaning of Section 2 (6) and (7) of the Act.

VII.

Respondent Idaho is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

VIII.

The Union is a labor organization as defined in Section 2 (5) of the Act.

IX.

The following unit is now, and at all times hereafter alleged was, an appropriate unit for the pur-

poses of collective bargaining within the meaning of Section 9 (b) of the Act at the Idaho Store: All employees in the Idaho Falls operation, excluding supervisors, as defined in the Act as amended.

X.

On or about September 15, 1950, pursuant to Board certification, the Union was then, now is, and at all times hereafter alleged was the collective bargaining representative of the employees in the unit described in paragraph IX, above, and by virtue of Section 9 (a) of the Act, has been and now is the exclusive representative of all the employees of the Idaho Store, in said unit, for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

XI.

On or about September 15, 1950, and April 14, 1951, upon numerous occasions between those dates, and at all times thereafter, Respondent Symns, and its successor, Respondent Idaho, after request and demand by the Union, refused and continues to refuse to meet and negotiate upon matters concerning wages, hours, working conditions, and other conditions of employment and to embody the same in a contract with the Union.

XII.

On or about March 13, 1951, Respondent Symns promised to and did grant a unilateral wage increase to its employees after having refused to discuss wage increases at the request of the Union.

XIII.

On or about March 14, 1951, the employees of the Idaho Store engaged in a strike for the reason that Respondent Symns refused to bargain with the Union as set forth and specified in paragraphs XI and XII, above.

XIV.

On or about March 15, 1951, and April 4, 1951, Respondent Symns discharged Lyle Carson and Reid Richey and all other striking employees while they were engaged in picketing the Idaho Store, and at all times since that date has failed and refused and does now refuse to reinstate them because of their membership and activities on behalf of the Union and their concerted activities and for the additional purpose of dissipating the Union's majority status.

XV.

On or about April 9, 12 and 14, 1951, Respondent Symns, after demand by the Union, refused to reinstate the following-named striking employees: Lyle Carson, Charles Graves, Reid Richey, Donald Forbush, Harris Ranson, at the Idaho Store, and at all times since that date has failed and refused, and does now refuse to reinstate them because of their membership in the Union and their union and concerted activities, and for the further purpose of destroying the Union's majority status. Respondent Symns on those dates conditioned bargaining with the Union upon the Union's procuring a new majority among striker replacements.

XVI.

By the acts described in paragraphs XI to XV, above, inclusive, between the dates of September 15, 1950, and April 14, 1951, and at all times subsequent thereto, Respondent Symns has failed and refused and does now refuse to bargain in good faith with the Union, the majority representative and certified bargaining agent as set forth in paragraph X, above, with respect to terms and conditions of a working agreement, wage increases, vacations, reinstatement of striking employees, and other bargainable issues concerning the employees in the appropriate unit described in paragraph IX, above, and by these acts, statements and conduct, and by each of them, and by other acts, statements and conduct, Respondent Symns has engaged in and is now engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

XVII.

By the acts described above in paragraphs XIV and XV and by refusing to pay wage increases and retroactive benefits to strikers and by other acts, statements and conduct, Respondent Symns has discriminated and is discriminating in regard to the hire and tenure and terms and conditions of employment of its employees named in paragraph XV, above, and has discouraged and is thereby discouraging concerted activities and membership in the Union, and by these acts and each of them, and by other acts, conduct and statements, it has engaged in and is thereby engaging in unfair labor practices

within the meaning of Section 8 (a) (3) of the Act.

XVIII.

By the acts, statements and conduct set forth above in paragraphs XI through XVII, inclusive, and by interrogating its employees concerning their union membership and activities, by assuring them of equal benefits without the necessity of their belonging to a Union, by promising them unilateral wage increases during the course of collective bargaining, by interrogation of employees concerning their strike activity, by threatening to close the operation before acceding upon bargainable issues, by threatening to close the Idaho Store before it would agree to granting a union security contract provision, and by other acts, statements and conduct between the period of September 1, 1950, and April 15, 1951, and by other conduct since those dates, Respondent Symns has interfered with, restrained and coerced the employees in the exercise of their rights guaranteed in Section 7 of the Act, and by all of such acts and each of them, it has engaged in and is now engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

XIX.

On or about the month of July, 1951, and at all times since that date, Respondent Idaho, as successor to Respondent Symns, and with knowledge of the acts, statements and conduct on the part of Respondent Symns set forth and specified above in paragraphs XI to XVIII, inclusive, and of the facts

set forth and specified above in paragraphs IX and X, Respondent Idaho continued to give effect to said acts, statements and conduct and thereby did engage in and is now engaging in unfair labor practices within the meaning of Section 8 (a) (1) (3) and (5) of the Act as set forth above and described in paragraphs XVI to XVIII, inclusive.

XX.

The acts and conduct of Respondents Symns and Idaho as set forth above in paragraphs XI to XIX, inclusive, occurring in connection with the operations of Respondents described above in paragraphs I to V, inclusive, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states of the United States, and have led and tend to lead to labor disputes which burden and obstruct the free flow of commerce.

XXI.

The acts and conduct of the Respondents Symns and Idaho described in paragraphs XI to XIX, inclusive, above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) (3) and (5), and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director of the Nineteenth Region, on this 31st day of March, 1952, issues this Com-

plaint against Symns Grocer Co. and Idaho Wholesale Grocery Co., the Respondents herein.

/s/ THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
Region 19, 407 U. S. Court House, Seattle 4,
Washington.

GENERAL COUNSEL'S EXHIBIT No. 1-N

[Title of Board and Cause.]

ANSWER

Comes now the respondent, Idaho Wholesale Grocery Co. and in answer to the complaint on file herein, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraphs 1, 2 and 3.
2. In answer to paragraph 4, this respondent did purchase the assets of the respondent, Symns Grocer Co.
3. In answer to paragraphs 5, 6, 7 and 8 the respondent admits the same.
4. In answer to paragraph 9, this respondent is informed and thereby alleges that a unit for the purpose of collective bargaining was determined by the National Labor Relations Board; this respondent however, does not know the exact job classifications contained in said appropriate unit.

5. In answer to paragraph 10, this respondent denies that this union or any union represents the majority of its employees for the purposes of collective bargaining. Admits the other allegations contained in paragraph 10.

6. In answer to paragraph 11, this respondent denies generally and specifically the allegation that there has been a demand made by the union, or anybody, to meet and negotiate on matters concerning wages, hours, working conditions and other conditions of employment and to embody the same in a contract with the union.

7. In answer to paragraph 12, this respondent is informed and therefore alleges that a wage increase was given to the employees of the respondent, Symns, in the sum of six-cents (6c).

8. In answer to paragraphs 13, 14, 15, 16, 17, 18, 19, 20 and 21, this respondent denies generally and specifically each and every allegation contained therein.

9. This respondent denies generally and specifically every allegation contained in said complaint not specifically admitted herein.

/s/ LOUIS H. CALLISTER,
Attorney for Respondent, Idaho
Wholesale Grocery Co.

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 1-O

[Title of Board and Cause.]

ANSWER

Comes now Symns Grocer Co. and in answer to the Complaint on file herein admits, denies and alleges as follows:

1. Admits that the respondent, Symns Grocer Co., is a corporation organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business at Salt Lake City, Utah.

2. Admits that it owned and operated the wholesale grocery outlet at Idaho Falls, Idaho, hereafter called the Idaho Store.

3. Admits the allegations set forth in paragraphs 1, 2 and 3 of said complaint.

4. In answer to paragraph 4, admits that the respondent, Idaho Wholesale Grocery Co. is an Idaho corporation, purchasing the assets of the respondent Symns Grocer Co. That it does not have facts upon which to predicate an admission or denial of the other facts contained in said paragraph 4 and therefore denies the same.

5. In answer to paragraph 5, this respondent alleges that it does not have facts sufficient to form a belief as to the truth or falsity of the matters alleged in said paragraph 5 and therefore denies the same.

6. Admits the allegations set forth in paragraphs 6, 7 and 8 of said complaint.

7. In answer to paragraph 9, this respondent admits that an appropriate unit for the purposes of collective bargaining was established by an election held at the place of business of the Idaho Store, and that the appropriate unit is that as set forth in said Board certification.

8. In answer to paragraph 10, this respondent admits that on or about September 15, 1950, pursuant to Board certification, the union was designated as the collective bargaining representative of the employees in said unit for the purposes of collective bargaining.

9. In answer to paragraph 11, admits that the respondent entered into collective bargaining with the union, and alleges that it bargained in good faith with respect to wages, hours, working conditions and other conditions of employment.

10. In answer to paragraph 12, admits that on or about March 13, 1951, the respondent Symns did put into effect an increase in the wages in the amount of six cents, but denies each and every other allegation contained in paragraph 12.

11. Denies the allegations in paragraph 13, of said complaint.

12. Denies generally and specifically each and every allegation contained in paragraphs 14, 15, 16, 17, 18, 19, 20 and 21 of said complaint.

13. Denies generally and specifically every allegation contained in said complaint not otherwise admitted herein.

Wherefore, respondent prays that the complaint be dismissed and for such other and further relief as the Court deems just in the premises.

/s/ LOUIS H. CALLISTER,
Attorney for Symms Grocer Co.

Duly Verified.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND
RECOMMENDED ORDER

A. C. Roll, Esq., for the General Counsel.

Louis H. Callister, Esq., of Salt Lake City, Utah,
for each Respondent.

Mr. Clarence Lott, for the Union.

Before: David F. Doyle, Trial Examiner.

Statement of the Case

This proceeding, brought under Section 10 (b) of the National Labor Relations Act, as amended, herein called the Act, was heard at Idaho Falls, Idaho, on April 29-30, 1952, pursuant to due notice to all parties. At the hearing all parties were represented, were afforded full opportunity to be heard, to examine and cross examine witnesses, to introduce evidence bearing on the issues, to argue the issues orally upon the record, and to file briefs and

proposed findings. All parties waived the filing of briefs.

The complaint, dated March 31, 1952, issued by the General Counsel of the National Labor Relations Board and duly served on the Respondents, was based on a charge filed by the above-named Union¹ on March 29, 1951, and amended February 29, 1952, alleged in substance that Symns (1) upon numerous occasions between September 15, 1950, and April 14, 1951, and at all times thereafter, refused to bargain with Local 983; (2) on or about March 13, 1951, granted a unilateral wage increase to its employees after refusing to discuss wage increases with Local 983; (3) that because of the refusals to bargain the employees of Symns engaged in a strike beginning on March 15, 1951, and thereafter Symns discharged striking employees Carson and Ritchie and has failed and refused to reinstate them, because of their membership and activities on behalf of the Union; (4) on or about April 9, 12, and 14, 1951, Symns, after demand by the Union, refused to reinstate all striking employees;² (5) by this conduct Symns has failed and refused to bargain in good faith with the Union in violation of Section 8 (a) (5) of the Act; and has discriminated in regard to the

¹ This labor organization will be referred to as the Idaho Falls Local or Local 983; the Respondent Symns Grocer Co. as Symns, and Respondent Idaho Wholesale Grocery Co. as Idaho.

² The employees being Lyle Carson, Charles Graves, Reed Ritchie, Donald Forbush, and Harris Ranson.

hire and tenure and terms and conditions of employment of its employees in violation of Section 8 (a)(3) of the Act; and (6) by the above acts, and other conduct it has interfered with, coerced, and restrained its employees in violation of Section 8 (a)(1) of the Act.

As to Idaho, the complaint sets forth that in the month of July, 1951, Idaho was created for the purpose of purchasing, and did purchase a wholesale grocery store herein called the Idaho store from Symns, and has at all times since that date operated the store as the successor of Symns, without interruption of business, and without substantial change in the business, method of operation, personnel, equipment, or customers. The complaint alleges that since the purchase of the Idaho Store, Idaho with full knowledge of the acts, statements, and conduct of Symns has continued to give effect to said acts, statements, and conduct and thereby engaged in the same violations of Section 8 (a)(1), (3), and (5).

In their duly filed answers the Respondents admitted the jurisdictional facts alleged in the complaint as to their businesses, and admitted that in July, 1950, Symns sold, and Idaho purchased the Idaho store. Both Respondents denied the commission of any unfair labor practices. Specifically, Symns alleged that it met and bargained with Local 983 as the collective bargaining agent of its employees at all times required by the Act, and that its conduct does not constitute any of the unfair labor practices alleged in the complaint. Specifically,

Idaho alleges that after it took over the Idaho store from Symns no demand for bargaining was ever made upon it, by Local 983³ and that the Union does not represent a majority of Idaho's employees.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondents.

By the pleadings Symns admitted that it is a corporation organized and existing by virtue of the laws of the State of Utah, with its principal place of business at Salt Lake City, Utah. During the years 1950 and 1951, it was a multistate enterprise engaged in the business and operation of wholesale grocery stores. During that period it owned and operated a wholesale grocery store at Idaho Falls, Idaho, previously designated as the Idaho store, which was an integral part of Symns' multistate corporation.

In the course and conduct of its business Symns annually purchased equipment and merchandise valued in excess of \$500,000 which was shipped directly to its wholesale stores from states other than the State of Utah. Additionally, it purchased large amounts of merchandising equipment within the State of Utah which originated in states other than the State of Utah. It annually sold and shipped merchandise valued in excess of \$25,000 to customers

³ In the course of the hearing the General Counsel stated that Local 983 had never made a demand to bargain on Idaho.

in states other than the State of Utah. The Idaho store annually, and particularly during 1950 and 1951, sold and transported merchandise valued in excess of \$75,000 per annum to purchasers situated in states other than the State of Idaho. During the same period, it purchased equipment and merchandise valued in excess of \$500,000 annually, which was shipped directly to it from points outside the State of Idaho. Also during the same period it purchased a large dollar volume of equipment within the State of Idaho which originated in states other than the State of Idaho.

By the pleadings Idaho admitted that it is a corporation organized and existing by virtue of the laws of the State of Idaho. It is a wholly-owned subsidiary of Utah Wholesale Grocery Co., a Utah corporation. The office and place of business of Idaho is located in Idaho Falls, Idaho, and the principal office and place of business of Utah Wholesale Grocery Co. is situated at Salt Lake City, Utah. The Utah Wholesale Grocery Co. is a multistate enterprise engaged in the business and operation of a chain of wholesale grocery stores. Idaho is engaged in the business of operating a wholesale grocery and has since its formation been an integral part of the multistate operation of its parent corporation. In the month of July, 1950, Idaho was created for the purpose of purchasing the Idaho store from Symns, and Idaho has at all times since that date operated the Idaho store as the successor⁴

⁴ "Successor" is here used in its broadest sense;

of Symns without interruption or without substantial change in the business, method of operation, personnel, equipment, or customers. In the course and conduct of its operations, Idaho has continued its interstate transactions in substantially the same dollar volume as Symns.

Upon the pleadings I find that at all the times material herein Symns was engaged in commerce within the meaning of the Act, and that after Idaho acquired the Idaho store, that corporation also was engaged in commerce within the meaning of the Act.

III. The unfair labor practices.

A. Undisputed Facts: background, appropriate unit, union majority.

Prior to July, 1951, Symns operated wholesale grocery outlets in the cities of Salt Lake City, Utah, and Idaho Falls, Idaho. After the sale of the Idaho store to Idaho, Symns continued to operate its Salt Lake City outlet. Robert Peel is the president and manager of Symns with his office at the principal office of the company at Salt Lake City. Peel at all times with which we are concerned had general authority over both grocery outlets. At Idaho Falls Symns' highest ranking official was E. C. Walker, who occupied the dual role of salesman and manager. It is undisputed that when Local 983 first made contact with Walker in regard to negotiations

it is obvious that Idaho did not admit it was the "successor" to Symns in the technical sense of the word which would be an admission of liability herein.

between the company and Local 983 that Walker informed the union representative that Peel was the only person who had authority to conduct labor negotiations for the company. Thereafter Peel was the official who represented the company in the negotiations which will later be described.

Local No. 983 has its headquarters at Pocatello, Idaho, which is some 53 miles distant from Idaho Falls. Clarence P. Lott is secretary-treasurer of the Local, and is authorized to conduct bargaining negotiations with employers by that Local. Lott's office is at Pocatello. Under Lott's direction, Ernest J. Mattox acts as business representative of Local 983 at Idaho Falls, Idaho, maintaining an office for the purpose in the Labor Temple at that city.

Joint Council No. 67, Teamsters, Chauffeurs, Warehousemen and Helpers Union, AFL, is composed of several locals of the Teamsters. Joint Council No. 67 has its headquarters at Salt Lake City, Utah. Member locals of the Joint Council are the following: Local No. 983, the charging party herein, Pocatello, Idaho, and vicinity, which embraces Idaho Falls; Local No. 222, Salt Lake City, Utah, and vicinity; Local No. 976, Ogden, Utah, and vicinity; and Local No. 483, Boise, Idaho, and vicinity. Fullmer H. Latter is secretary of Local 222, Salt Lake City, and has also the separate and distinct office of secretary of Joint Council No. 67. His office is in Salt Lake City. Ernest T. Bailey is business representative for Local 222, and Harry W. Garrett is statistician for Joint Council No. 67, both with headquarters at Salt Lake City, Utah.

For some 9 or 10 years prior to the time with which we are concerned, Symns had labor relations with Local No. 222, Salt Lake City, who represented the employees of Symns at its Salt Lake City store. For several years prior to January 1, 1951, Symns had conducted its bargaining for the Salt Lake City store on a multiemployer - multiunion basis. The group of employers involved in this bargaining were, Symns, and Utah Wholesale Grocery Co. which operated stores at Salt Lake City, and elsewhere in Utah, and John Scowcroft and Sons Co., which operated wholesale groceries at Salt Lake City, Ogden and Price, Utah. Local 222 represented the employees of all three firms at Salt Lake City, and Local 976 represented the employees of Scowcroft at Ogden and Price, Utah.⁵ In the bargaining of these groups, the employers were represented by the Industrial Relations Council of Salt Lake City, and the unions by their several representatives. These groups bargained annually, and at the time the instant controversy arose, the groups were bound by a contract which would automatically renew itself on March 1, 1951, unless a party to the contract notified the other parties of a desire to modify the contract prior to January 1, 1951. It is undisputed that the Salt Lake City Locals gave the aforesaid timely notice thus terminating the contract as of March 1, 1951. Though the instant proceeding is concerned only with the unit of Symns employees

⁵ Occasionally in this report these two Locals, 222 and 976 are referred to collectively as the Salt Lake City Locals.

at Idaho Falls, the relationship of Symns to the other employers, and other Locals is necessary to a clear understanding of the events which will be later set forth.

It is undisputed that around August 6, 1950, the employees of Symns at its Idaho Falls store joined Local 983. At that time there were five men performing the general duties of truck drivers and warehousemen. It is apparent from the record that all five men joined the Union. On August 14, 1950,⁶ Local 983 addressed a letter to the company at Idaho Falls in which the Union demanded bargaining rights and sought a date for the initiation of contract negotiations. On August 16 Peel replied on behalf of Symns as follows:

Mr. Walker has sent me your letter of the 14th in regard to your claim to represent our employees. In the absence of the usual proof, and under the circumstances we think that you should proceed in the regular specified way by filing your petition with the NLRB requesting an election, and let them hold it as they do in all such instances. We assure you we will co-operate in every way possible.

Thereafter by consent of both parties the Regional Office of the Board set up a representation election and a union authorization election in a unit of Symns' Idaho Falls employees described as follows:

⁶ All dates in this portion of the report are in the months of August, September, October, November, and December 1950, and January, February, March, and April 1951, unless otherwise noted.

All employees in the Idaho Falls operation, excluding supervisors as defined in the Act as amended.

On September 6, 1950, in a Board-conducted election on the question concerning representation the employees voted 5 to 1 for the union, and on September 8, 1950, in the union authorization election, the employees voted 5 to 0, to authorize the union. On September 15, 1950, the Regional Office issued a certification of representatives to the Local for the employees in the above unit, and on September 25, 1950, issued to the Local a certification of union shop authorization.

On the basis of these undisputed facts, I find that the unit as described above is an appropriate unit for the purposes of collective bargaining, and I further find that on September 15, 1950, and thereafter Local 983 was the duly certified bargaining representative of Symns employees in the aforesaid appropriate unit, and that on September 25, 1950, Local 983 was authorized to bargain for a union shop with Symns.

On October 20, Clarence P. Lott, secretary of Local 983, by a telephone call to Peel raised the subject of contract negotiations. Thereafter there occurred a series of conferences, calls, or meetings which are the subject of dispute. The evidence as to these meetings will be set forth in detail later.

However, it is undisputed that on March 14, 1951, the employees of Symns at Salt Lake City, and the employees of Scowcroft and Utah, all represented by Locals 222 and 976 struck for the purpose of obtaining a higher rate of wage and a union shop.

On the following day, March 15, the employees of Symns at Idaho Falls also struck.

The principal issue in this proceeding is whether the strike of employees at Idaho Falls was an economic strike or an unfair labor practice strike.

It is also undisputed that on March 27 the strike in the wholesale houses of John B. Scowcroft and Sons, and Utah Wholesale Grocery Co. was settled by a contract between those firms and Locals 222 and 976. On April 9 the strike concerning the employees of Symns at Salt Lake City was settled by an agreement between Symns and Local 222. The strike at Idaho Falls was not settled, which gives rise to the present controversy.

B. Undisputed facts. The beginning of negotiations.

Clarence P. Lott, secretary-treasurer, Local 983, whose office is at Pocatello, Idaho, testified that on October 20 he phoned Peel at the office of Symns at Salt Lake City to arrange for collective bargaining conferences. Lott explained, that though the elections which were won by the Union were held in September, he did not take the matter or bargaining conferences up with Peel until October 20, because that was the first date, after the employees were organized, on which he was in Salt Lake City. He had been informed by Mattox, business representative of the Union at Idaho Falls, that Walker, the manager at Idaho Falls, did not have authority to bargain for the company.

In his telephone call Lott informed Peel that the Union had been certified by the Board and suggested

that a meeting be arranged. Peel said that he would like uniformity in the labor agreements affecting both Salt Lake City and Idaho Falls. Lott told Peel that the Union had no objection as a general thing to uniformity, but because the Atomic Energy Commission had located an installation in the Idaho Falls area that the wage picture was changing fast, and that Lott felt there should be a differential in wage scales in favor of the Idaho Falls area. Lott also pointed out that Local 983 had been successful in getting a more liberal vacation clause than was usually obtained by the Salt Lake City Local, and that there had not been any union security clause in the Salt Lake City agreements. Peel suggested that Local 983 prepare a proposal and send it to him. Lott agreed to do this, which terminated the conversation.

At the hearing it was stipulated by the parties that on November 8, 1950, the Union mailed to the company its proposals in the form of a document entitled *Grocery Warehouse Agreement (1950-1951)*.⁷ This document is in the form of a complete contract covering all the conventional conditions of employment. The principal features of this document were that the Union asked for a union shop and a wage increase of approximately 33 cents an hour. It was also stipulated by the parties that on November 16, 1950, Peel replied by the following letter addressed to E. J. Mattox, the business representative of Local 983, at Idaho Falls, Idaho.⁸

⁷ Exhibit No. 2, in evidence.

⁸ This letter is Exhibit No. 3, in evidence.

Dear Mr. Mattox:

In connection with yours of November 8th submitting proposal (sic) for contract with the warehouse employees at Idaho Falls, we have the following comments to make:

Article 2 we are not agreeable to as we do not believe that any man need necessarily belong (sic) to the union as a conditions (sic) of employment.

Article 7 we are agreeable to writing in the present wages we granted in August:

Shipping and/or Receiving Clerks and Checkers	\$1.22
Cash and Carry Men, Order Runners, Stackers, Pilers, Warehousemen...	1.17
Truck Drivers	1.17
Beginner's Rate	1.11

Article 8 overtime we suggest you work "all work in excess of 40 hours in any one working week and work performed on Sunday to be paid at the rate of time and one-half."

Article 9 in order to conform with our present practice and the contract in effect with our Salt Lake employees we are agreeable to granting vacations at the rate of one week after one year and two weeks after three years.

Article 12 arbitration we prefer not to enter into any such agreement as we believe we can settle our own problems with the union to better advantage.

Article 6 in the matter of holidays while we do not recognize Armistice Day we believe the situation to be slightly different in Idaho and it is most generally recognized in the outlying territory. As there

would be less confusion there we are therefor, agreeable to recognizing Armistice Day inasmuch as July 24th is not a recognized holiday in Idaho although it is in Utah. This would have the effect of making the same number of holidays to the employees at Idaho as in Salt Lake.

In the matter of line drivers we have no such employees. We do have one or two drivers who make short trips out of the city but they are only for a day or a day and a half at a time and the rest of the week they are employed within the warehouse. To make a distinction would cause endless confusion. We offer this in order to clarify the situation as far as your thinking may be concerned.

C. The disputed events.

1. The conference of November 24.

The next contact between Local 983 and Symns in the process of negotiation occurred on November 24. Lott testified that Business Representative Mattox wanted to go to Salt Lake City for Thanksgiving Day, so he suggested that Mattos do that, and while at Salt Lake City that he confer with Peel in regard to the contract.

Edward J. Mattox testified that in his first conversation with Walker, the manager of Symns Idaho Falls warehouse, Walker and told him that Peel was the only officer authorized to bargain for the company. On November 24 Mattox, and Harry W. Garrett, Statistician for Joint Council No. 67, by previous arrangement conferred with Peel at his Salt Lake City office. In the conference Mattox told

Peel that he was prepared to talk contract. Peel replied that he wasn't desirous of talking about the Idaho Falls operation, since he had negotiations coming up in the Salt Lake City operations, and as a consequence he didn't want to do anything about Idaho Falls, until such time as he had completed negotiations in Salt Lake City. Mattox reminded Peel that it was his understanding that the Salt Lake City negotiations were then some 3 months away, and that Local 983 had complied with the company's request for a Board conducted election, and that the employees at Idaho Falls were anxious for negotiations. Peel again stated that he was more interested in Salt Lake City. The men then discussed the situation and Peel said that he was desirous of complete uniformity in the operations at Idaho Falls and Salt Lake City. Peel then objected to the proposed pay scale, and Mattox told him that he was there to discuss wages and bargain with Peel on that point. He asked that Peel make some offer of an increase which he could take back to the men. With that, Peel again said that he was desirous of uniformity in the Salt Lake City-Idaho Falls operations. Mattox replied that the Union was not too hard to get along with, and that an interim agreement would satisfy it, if Peel was insistent upon waiting until he could negotiate a Salt Lake City agreement. After the conferees had discussed the feasibility of, and the proposed terms of an interim agreement for some time, Peel said that he would not sign a contract for less than one year's duration, or a contract for a year, which was not substan-

tially the same as his proposal of November 16. In the conference Peel also objected to any form of union security in the contract, and the conferees argued at length on that subject.

Mattox testified that the conference ended at about this point when Peel said that he intended to come to Idaho Falls in the near future, and would continue the negotiations with the union at that time. It is undisputed that Peel did not go to Idaho Falls, until nearly 5 months later, some time after the strike at Salt Lake City was settled.

Harry W. Garrett, statistician for Joint Council No. 67, testified that he accompanied Mattox on November 24 and engaged in the conference with Peel. He testified that after mutual introductions were accomplished, Mattox informed Peel that he was in Salt Lake City to negotiate a contract for the Symns employees at Idaho Falls on the basis of the union proposal which had been previously mailed to Peel. Peel said that he did not desire to negotiate a contract for his employees in Idaho Falls at that time, because his employees, who were members of Local No. 222 at Salt Lake City would have their contract re-opened on the subject of wages in the new year, and Peel did not want to negotiate any terms for the Idaho Falls employees which would conflict with the terms that might come out of the negotiations at Salt Lake City. Mattox called Peel's attention to the date upon which Local 983 had been certified as representative of the Idaho Falls employees, and to the fact that there had been no negotiations concerning a contract until that

date. Mattox stated that he felt strongly that negotiations should be undertaken immediately. Peel reiterated his objections to negotiating in regard to Idaho Falls prior to the settlement of the negotiations at Salt Lake City. At that point in the discussion Mattox suggested to Peel that the parties enter into an interim agreement based on Peel's proposal of November 16, which would be in effect until negotiations were completed in Salt Lake City at which time the parties could then negotiate a contract for a definite length of time. In objecting to such a contract Peel stated that the financial circumstance surrounding the Idaho Falls operations were not satisfactory, and if the financial situation of the company at Idaho Falls did not improve, that it could very well be that the Idaho Falls operation would be closed prior to the completion of negotiations in the Salt Lake City area. Mattox then told Peel it appeared to him that Peel would accept neither an interim contract on his own proposal, or a contract for a year which was based on the union's proposals. Mattox informed Peel that the Idaho Falls employees would be very unhappy at such an outcome to the conference. In the course of the conference Mattox pointed out to Peel that the employees had voted to authorize the union to secure a union shop. Peel stated that he was opposed to the union shop, and in discussing the point, again stated that if the financial situation at Idaho Falls did not improve the operation might be closed.

Mattox and Peel had considerable conversation about the desirability of uniformity of wage rates

at Salt Lake City and at Idaho Falls. In discussing this point Mattox asked Peel if he would agree to give to the employees at Idaho Falls the same terms and conditions of work as might be negotiated in the forthcoming negotiations at Salt Lake City. Peel refused to commit himself on that point. According to Garrett the conference came to a close when Peel stated that he would be in Idaho Falls in the very near future and that he would talk to the union representatives at that time.

Both Mattox and Garrett testified in a forthright manner, and their testimony is mutually corroborative. I credit their testimony.

There appears to have been no contact either by letter, phone, or personal interview between Local 983 and the company between November 24 and January 6. Meanwhile the Salt Lake City Local had given timely notice to Symns, Scowcroft, and Utah that it desired to modify the existing contract.

2. The telephone conversation of January 6.

On January 6, 1951, Lott was in Salt Lake City and he phoned to Peel at the latter's office. Opening this conversation Lott pointed out to Peel that the meeting between Mattox and Peel on November 24 had not made any progress toward reaching an agreement, and the Union was concerned about the imminent wage freeze of the Wage Stabilization Board. Lott asked Peel if he would consider giving an increase to the employees at Idaho Falls, explaining that the union was requesting all employers at that time to give a voluntary increase in wages to offset the skyrocketing cost of living. Peel told Lott

that he would be negotiating with the Salt Lake City locals shortly, and that he was not interested in whether or not there would be a wage freeze, nor was he interested in negotiating for Idaho Falls, until he had disposed of the negotiations in Salt Lake City. Lott requested Peel to meet with representatives of Local 983 at Idaho Falls, but Peel replied that he would not go to Idaho Falls to meet with the Local, until such time as the Salt Lake negotiations were terminated. The next contact of the parties was on March 1.

3. The telephone conversation of March 1.

On that date Lott was at Salt Lake City. He talked to Fulmer H. Latter, secretary of Local 222, and secretary of Joint Council No. 67 and to Ernest T. Bailey, business representative of Local 222. He asked Bailey how negotiations were proceeding as to the grocery warehouses in the Salt Lake City district. Latter and Bailey informed Lott that no progress had been made.

After his conversation with Latter and Bailey, Lott phoned Peel. His version of the telephone conversation is as follows:⁹

A. I called Mr. Peel and asked him if we couldn't get together on a contract, and he again told me that he had—that he could not meet with me until he got the Salt Lake negotiations out of the road; that he was in the process of having a meeting with the Salt Lake grocer warehouses in connection with the contract, and that until those negotiations were

⁹ Transcript page 111.

cleared up that he would not meet with me. Well, first, I might say this, that I identified myself, and asked Mr. Peel if he was free at one-thirty, and he said, "Yes," and I asked him to have a meeting, and he said he would be glad to have a meeting, and then he asked what the purpose of the meeting was, and I told him I would like to discuss the contract in the Idaho Falls area, and he said that would be useless, he said "That would be a waste of time for us to meet and discuss the contract until such time as we get the Salt Lake negotiations out of the way." And I asked Mr. Peel then if he would give us the identical contract—if that was his position, if he would give us the same contract that Salt Lake had, and he said he didn't see any reason why he should make any commitment as to what he would give us. I told him I understood from Mr. Bailey and in talking with Mr. Latter that they had made a request for twenty cents an hour increase, and that they had made a request for a Union Shop. He said they would never get a Union Shop, and I said, "Suppose they get one, will you give it to us?" He said, "No, I wouldn't give—I am not making any commitments, whatsoever, as to the Idaho Falls operation." And I said, "Well, then, probably we better use our economic strength to force a contract, and do it in connection with and at the same time, as I understand that Salt Lake is anticipating a strike in their operations, and if that's the position of the company we probably better use our economic strength at the same time that Salt Lake uses theirs." He said, "Go right ahead. You don't

represent our employees, anyway. You haven't got a man up there. Everyone of them tells us that they don't belong to the Union." I said, "Well, that isn't the certification, according to the Board. We are certified, and," I said, "you are not following the desires when you deny any discussion of the Union Shop, and the employees voted one hundred per cent for a Union Shop." We argued about that, and he said they did not, and I asked him if he would grant us one if the certification so showed that, and he said no, he would not. And he said, "If you think that your boys will go on strike up in Idaho Falls, why, go right ahead. You don't represent the employees up there, anyway. There isn't any of them that belong to the Union." And so, I told him then that would probably be our procedure, we would contact the Idaho Falls boys and see whether they wanted to, and it would be up to them to decide, and the issue would probably be decided whether we represented them by a strike vote of the employees.

4. The strikes; the hiring of replacements at a higher wage.

It is undisputed that the negotiations at Salt Lake City foundered upon the questions of wages and the union shop. On March 14 the employees of Symns and the other grocery firms at Salt Lake City struck to enforce their demands on these subjects. On the following day, March 15, the employees of Symns at Idaho Falls also struck. An informal strike vote was taken by the Idaho Falls employees at a meeting with union representatives on the night

of March 14. The strike became effective on March 15, as on that date the employees ceased work and began picketing the Idaho Falls store.

Despite the strike by all 5 employees Symns immediately took steps to keep its Idaho Falls store in operation. According to records stipulated at the hearing, on March 19, Symns had employed a full crew of replacements. Though some replacements were terminated prior to April 3, new employees were immediately hired to fill these places. After March 19 the company operated with a full crew of replacements.¹⁰

It is undisputed that these replacements were hired and paid at a rate of pay 6c an hour more, than previously paid to the strikers.

5. The conference of March 27.

With the strike in full force and effect at both Idaho Falls and Salt Lake City, there occurred no contact between the Idaho Falls local and Symns until March 27. Some time shortly before March 27 a call for a meeting concerning the strike at Salt Lake City was issued by Lyle S. Johnson, a conciliator of the Federal Conciliation and Mediation Service. Lott testified that Fulmer H. Latter's secretary at Salt Lake City notified him of the meeting and he attended. The meeting was held at the office of the Industrial Relations Council, Salt Lake City. The meeting was attended by several representatives of the Salt Lake City locals and by representatives of the various wholesale houses. At the

¹⁰ Chart, Exhibit No. 5.

beginning of the meeting, the conciliator, requested each of the representatives at the conference to identify himself.¹¹ When Lott identified himself as representing the Idaho Falls local, Callister, attorney for the Respondent, objected to Lott's participation in the conference, and as an ultimate result Lott was permitted to participate in the conference only as a spectator. Lott's testimony on this point is as follows: ^{11a}

Q. (By Mr. Roll): Now, will you relate what happened in that meeting as it pertained to you?

A. Mr. Johnson, the Conciliator, whether it was a matter of procedure I do not know, or whether there were so many faces that he wanted to clear the record, asked the group that was sitting at the table if they would identify themselves and who they represented, for clarification of his records; and it was started at the head of the table, and when I identified myself as of Local nine eight three, of Pocatello and Idaho Falls area, Mr. Callister immediately objected to me sitting in the meeting; that I was not a part of the bargaining unit; that historically it bore out that the grocery warehouse had negotiated in the Salt Lake area for the Salt Lake area as a group, and we were separate and apart as a bargaining unit. And there was quite a considerable argument, and some of the other employers objected from Salt Lake that was sitting there, and I told them that our employees had gone

¹¹ No transcript of these proceedings was made.

^{11a} Transcript, page 115.

on strike because we were unable to secure a contract and for that reason we had asked Local ninety-three (sic) to notify us of any meeting of the Conciliation Service that the Service called, as we understood or knew that they would be in the picture, and that we would like to sit in with them in an effort to settle the Idaho Falls strike at the same time.

As I say, when Mr. Callister raised the issue on the fact that we were separate and had a separate election, the history of the bargaining unit had not been—that we had not bargained in a group, that the Idaho Falls had never been included, the Conciliator said he would have to go along with the employers' objection, but asked if there was any objection to me sitting into the meeting as a spectator, and they said no, they had no objection as long as I had no voice in the negotiations.

Q. (By Mr. Roll): I think you said that some employer representatives commented. Do you recall any employer representative in particular?

A. I think Mr. Peel raised the objection, and Mr. Smith were the two most emphatically. There was quite a heated argument—discussion for just a few minutes as to my presence, ~~that~~ I was an outsider, and I had no business there, and also the Conciliator said they would have to go on because there was a different Regional Board, and as far as he was concerned he had had no notification of Idaho Falls being in the dispute, and that he could not allow me to sit into it, as we were under a different Board, and unless the conciliation board had turned over

the authority for conciliation that I would not be allowed to participate.

Q. Clarence, I wish you would exhaust your recollection now on the statement that you made before that group, as to the reason why you were there, and why you were seeking to participate or seeking to sit in.

A. Well, our employees had gone out on strike to force a contract with the Symns Wholesale, and in connection with it we felt that the * * * (Emphasis supplied).

Mr. Callister: Well, just state what you said Mr. Lott, not what you felt. In other words, we want just your conversation.

A. I made the statement that our employees were out on strike to force a contract with the Symns Wholesale Grocery, and it was advantageous for us to go out on strike at the same time as Salt Lake and that we were there for the same purpose as Salt Lake, to try to settle that—the strike, as Salt Lake was out on strike, we were there to settle the strike in the same manner and under the same conditions as Salt Lake settled it. (Emphasis supplied.)

Q. (By Mr. Roll): Did you set forth in your discussion at that meeting any of the reasons why you were on strike?

A. Only the fact that we were out on strike to force a contract with Symns, that they had failed to bargain with us, had failed to meet with us, they had never been in the Idaho Falls area, had never once in the period of the time from certification

we had never had an employer representative meet with us in the Idaho Falls area to discuss a contract.¹²

6. The settlement of the strike at Salt Lake City and negotiations in regard to the strike at Idaho Falls.

It is undisputed that this conference of February 27 reached a partial settlement of the Salt Lake City strike. In the negotiations the representatives of the unions and the representatives of the employers were separated by the conciliator. He worked with each group in turn. Finally, he reported to the Unions that Scowcroft and Utah were willing to offer the Salt Lake City local an increase in wages of 6 cents per hour to be granted immediately, and a further increase of 7 cents per hour to be effective when, as, and if, the Wage Stabilization Board permitted the increase. The employers were also willing to grant some union security which in form was a modified maintenance of membership clause. These terms were acceptable to Local 222, Salt Lake City, and Local 976, Ogden, Utah.

However, one stumbling block developed as to making the agreement applicable to the Symns. The settlement agreement for Salt Lake City provided that all men on strike were to be reinstated to their positions. Neither Scowcroft nor Utah had attempted to operate their warehouses with replace-

¹² Lott's testimony on this point was undisputed except that Callister in his brief testimony claimed that he did not initiate the objection to Lott's participation.

ments during the strike, so this particular provision contained no impediment to settlement for those two companies. However, Symns had hired three replacements at Salt Lake City. On March 27, Peel took the position for Symns that he would not discharge the replacements to make room for the return of the strikers. In all other respects, including wages and a maintenance of membership clause, Peel was agreeable to the terms of the Salt Lake City settlement. When Peel on behalf of Symns objected to the settlement, that objection prevented settlement by the other two firms with the unions. So, despite the fact that all parties were on the verge of settlement of the Salt Lake City strike, settlement was delayed until the next day.¹³

Peel testified credibly that on the next morning he phoned Hampton of the Industrial Relations Council and notified him that it would be all right for Scowcroft and Utah to settle with Local 222 and Local 976, without Symns. He further notified Hampton that he was prepared to settle on the same terms, provided it was not necessary for him to discharge replacements to make room for the return of the strikers. Scowcroft and Utah and Locals 222 and 976 then settled their strike, the strikers returning to work under the conditions of the new contract.¹⁴

With the negotiations of Local 222—Symns in

¹³ Findings in this paragraph are based on the credited, uncontroverted testimony of Peel.

¹⁴ This testimony of Peel was not disputed.

this state, Local 222 took direct action to break the impasse. According to the credited testimony of Ernest T. Bailey, business representative of Local 222, that union had kept in touch with the men who had been hired as replacements at Salt Lake City. On April 5, union representatives had a talk with these men, with the result that the replacements joined the union, and accepted jobs elsewhere, vacating the jobs they held at Symns. With the jobs thus vacated, on the next day, Latter, Secretary of Local 222 and of Joint Council No. 67 called on Peel at his office.

7. The Meeting, April 6.

The only testimony as to this meeting was given by Peel. Latter did not testify. Peel testified credibly, that on April 6 Latter called at his office and told him that the men who were employed on Symns' job at Salt Lake City as replacements for the strikers had left Symns employ. Latter then requested Symns to settle the strike on the same basis as the other two companies had. Peel replied that he was willing to settle the strike on the same terms as the other companies, as long as he was not required to discharge the replacements whom he had hired, and that inasmuch as that problem had been obviated, he would settle with Latter as regards Salt Lake City. Latter then asked Peel if he would settle the Idaho Falls strike. Peel again told Latter that he had hired a full crew of replacements at Idaho Falls, and he refused to discharge these men to make room for the strikers. Peel stated that he was willing to extend all other terms of the

contract at Salt Lake City to Idaho Falls, but he would not discharge the replacements. Latter then asked Peel if Peel would give him some time to see if the union representatives could work out the situation at Idaho Falls in the same way it had been worked out at Salt Lake City—by having the replacements join the Union and take employment elsewhere. Peel stated that he was agreeable to any such arrangement and at Latter's request agreed to give Latter until the following Monday morning to effect the arrangement. Latter asked Peel to notify Walker, Symns' manager at Idaho Falls, that it was permissible for union representatives to talk to the replacements on the job at Idaho Falls. Peel agreed to do this, and phoned Walker that any union representatives who wished to talk to the replacements were to be permitted to do so.

Later on this day, Latter called Peel and told him that he found it impossible to go personally to Idaho Falls but would ask some of the Idaho Falls representatives to try to effect the arrangement. Peel agreed that this would also be satisfactory.

On Sunday, April 8, the conciliator notified all parties of a meeting at the office of the Industrial Relations Council on the next morning, April 9.

8. Meeting of April 9.

This meeting was attended by Peel; Thoreson and Hampton of the Industrial Relations Council; Mattox and Lott, Local 983; and Bailey and Latter, Local 222. Lott testified that at this meeting Peel offered to settle the Salt Lake City strike with Local 222 on the same terms as the other firms had

settled. It was pointed out that now, Symns had no replacements working at Salt Lake City. Local 222 accepted the offer. Then Latter asked Peel if the same settlement could be effected for Idaho Falls. Peel replied, "Absolutely not." According to Lott, Peel said, "he would make a survey at Idaho Falls, and see what the conditions was in the next few days, and he would meet with us up there, but he would not settle on the same conditions as he was settling in Salt Lake."

Peel in his testimony stated that at this meeting he offered to settle the Idaho Falls strike on the same terms as the Salt Lake City strike, except that he refused to discharge any of the replacements to make room for the strikers.

Lott testified that at this meeting he requested Peel to reinstate the striking employees. Peel refused and suggested that if the union could prevail upon the replacements to quit, as had been done at Salt Lake City, that then the situation would be clarified to the extent that Peel could make a contract with the union.¹⁵

Lott testified that on April 13, he and Mattox went to the Symns' warehouse at Idaho Falls. Walker permitted them to talk to the replacements. Their conversation with the men lasted about an hour and a half, and was terminated when Walker

¹⁵ In view of this testimony by Lott, it seems probable that Peel offered to settle on the same terms, as at Salt Lake City, except that he would not discharge replacements, and reinstate the strikers. I so find.

told them that the men had work to do. The union was unsuccessful in effecting the resignation of the replacements. When the representatives of the local had finished talking to the replacements, Lott went into the office, and accused Walker of talking to the men against resigning, and demanded again that the striking employees be reinstated. Walker refused.

During all his testimony Lott's demeanor was that of a fair and candid witness. I credit his testimony, except that portion dealing with the conference of April 9, which I have previously noted. In that testimony he appeared to have not fully understood his questioner.

After the attempt of the union representatives to enroll the replacements in the union and accept employment elsewhere proved futile, the strike continued. Also Symns continued to operate its Idaho Falls warehouse with the crew of replacements. Finally on May 18, 1951, the picketing of the warehouse was discontinued.

9. Other testimony as to the cause of the strike; alleged incidents of interference, restraint, and coercion; the alleged discharge of Ritchie and Carson; status of Carson.

Reed T. Ritchie testified that he had several conversations with Manager Walker. The first of these occurred on or about January 10. On this occasion Walker told him that according to the newspapers the Wage Stabilization Board was permitting raises, and that the men were going to get a raise, and that there was no need to join the union, that the union

wasn't any good, and for Ritchie to stay clear of the union and not waste his money.

On another occasion, about March 12, Ritchie engaged in a conversation with employees Carson, Graves and Forbush. The men were discussing why they had not received the 6c per hour increase in pay, which the newspapers said the Wage Stabilization Board would permit. While the men were talking Manager Walker came to them, and said that the men were getting a raise of 6c per hour, that the government had permitted it, and that it would be on their next pay checks, due March 15. On the day after the strike Ritchie, Mattox, and several employees went to the office of the company for their checks. Manager Walker told the men that the checks had been sent back to Salt Lake City, so that they could be corrected, because the checks contained pay for March 15th, the first day of the strike, on which date the men had not worked, and to take off the pay increase which had been computed into the amounts on the checks.¹⁶

On April 4, while Ritchie was engaged in picketing at the store he had another conversation with Walker. On that occasion Walker asked Ritchie what he was doing. Ritchie replied that he was picketing for the union, as the union felt that it

¹⁶ It should be noted in connection with this incident that the original checks were later produced by the Respondents, and it was thereupon stipulated that the checks contained no increase in pay, but did contain pay for March 15, which was consistent with the contentions of the respondents.

needed a raise in pay and the men had been told they would get a raise. Walker said, "Well, you are fired; you can't come back in here and work. If I were you I would get out of here because the union is no good, and you are only paying money into it, I would slip off this picket line right now."

Harris Ranson, one of the striking employees testified concerning the strike-vote meeting. He said that at the meeting Mattox told the men that the Local could not arrange satisfactory bargaining conferences with Symns and for that reason the men struck. On cross examination Ranson also testified that at the meeting Mattox informed the men that the employees at Salt Lake City had struck, and that fact also was a reason for their strike on the following morning.

On March 16, Ranson was in the group of employees who went into the store for their checks. Walker told the men that he had sent the checks to Salt Lake City for correction, and that, "if we had stayed we would have got a raise, that our wages would have been a dollar twenty-three for the warehousemen."¹⁷

Lylé Carson. In the course of the hearing a question arose as to the supervisory status of Carson, as foreman of the warehouse, the General Counsel contending that Carson was an employee,¹⁸ and the Respondents, that he was a supervisor.

¹⁷ Apparently this is the correct version of Walker's statement, in view of the fact that the checks did not contain a raise.

¹⁸ In the General Counsel's complaint Carson was

In testifying as to his duties Carson appeared to be fully conscious of his personal stake in maintaining and proving that he was not a supervisor. He was evasive on simple questions, the answers to which might tend to establish his supervisory status, and was fulsome in his disclaimers of any real authority in the warehouse.

He testified that at the time he was hired it was his understanding that one, Wright, was foreman. Later on he was given the title of foreman, but he "couldn't say that I was a foreman." He replaced the former foreman when the latter became a salesman in 1949. Carson testified that when the former foreman went on the road, "of course they had to have somebody in there in his place, and they asked Charley Graves if he wanted it, and he refused and he recommended me." Carson testified that he didn't want the position, but that McIntyre the then manager prevailed upon him to take it. Carson hesitated about taking the job, because he is not the kind of man that can give orders. He testified that the only job that he estimated he was capable of, was working in the warehouse. He did not remember whether Walker, the manager, outlined the scope of his authority; or told him what he was supposed to do. He testified that, "he just took it for granted that he was just another employee in the warehouse."

alleged to be an employee, while in the General Counsel's bill of particulars Carson was named as a person whose conduct could bind the company. At the hearing the General Counsel took the position that Carson was an employee.

He received a raise of 5 cents per hour at the time he took the job. He stated that as foreman he performed the same duties as he had performed as a warehouseman previously; that there was only one change in his job, and that was, that he was given a key to the warehouse. One new duty he gained was making out the freight bills and invoices in a little office. Carson explained that each night he checked the freight bills with the manager, and then the bills were placed in the files.

As to his authority as foreman in the warehouse, Carson testified that Walker called him the foreman, and said he had authority to order the boys around, but that he refused to do so. Carson stated that it was some time in February, 1950, that Walker told him he had authority to order the boys around. The witness testified that on this occasion Walker was trying to "bolster" him as foreman to boss the other fellows around, but that he refused to give orders. Orders were given in the following way—"Mr. Walker wanted something done at times he told the men out in the warehouse, and at times he told me, and I would relay that to the men." He did not hire anyone, nor was he ever told that he had authority to hire anyone. He never fired anyone nor recommended that they be fired. He never trained any new employees. When he decided something should be done in the warehouse, he did it himself or asked the other fellows to help him, and they always complied with his requests. He never criticized any of the men in the warehouse for the manner of work performed; never told men what

orders to fill, or told truck drivers when to take their trucks out. He had never checked with the customers as to service, or received complaints from customers, or complained about any man's tardiness. He did not keep the men's time. He said the men might "mention" a raise, but they didn't come and ask him for a raise. He received no complaints from the men.

Sometimes he worked overtime when shipments were received late. He did not receive overtime pay for this, but Walker would allow him some overtime pay later on. Sometimes on Saturdays he went to the warehouse to let the customers have orders, but did not receive extra pay for that. He alone did the billing in the billing office. He was instructed by Walker to report any difficulty in the warehouse. On one or two occasions he spoke to Walker about men not performing their work properly. He did not know what steps Walker took thereafter in regard to the men.

Carson was far from being a disinterested witness on this point. I credit his testimony on his duties only to the extent that it is corroborated by other witnesses. On other points Carson appeared to testify much more disinterestedly.

Carson testified credibly to a conversation with Walker, the manager, on the day of the strike. His testimony is as follows:¹⁹

A. I handed him the keys, and told him I guessed I didn't have any more use for them, and

¹⁹ Transcript page 354.

he—I believe at that time he told me that I didn't have to go out on strike, that I was supposed to be a foreman, and I didn't have to go out on strike. And I informed him that I was sticking with the boys, and even if I didn't go out on strike I would be canned for not reporting for work, as I wouldn't cross the picket line. And he said at the time that he felt sorry I felt that way about it, and I told him that was the way it had to be, and I believe then I walked on out. (Emphasis supplied.)

Q. (By Mr. Roll): Did you discuss with Mr. Walker the reason why you were on strike? Did you give him a reason?

A. Yes, he asked me—or, I told him that we were striking, as we were after a contract. And we spoke about Union Shop there, and he said that was out, that we could not—we would never get the Union Shop, that Symns Wholesale, or, if I remember correctly, Mr. Peel at Salt Lake would close the doors before he would grant us a Union Shop.

Q. Well, what reason did you give him for striking, at that time?

A. Well, we were after, trying to negotiate for a contract, and didn't seem to be getting anywhere with it, and it had been some time, and we was getting worried, you know? more or less what was happening and what was going to happen.

Carson testified that at the strike-vote meeting Mattox told the employees that the employees at Salt Lake City had gone out on strike, and asked the employees if they wished to strike at Idaho

Falls, as it would probably be advantageous to them.

Carson also testified that on April 4 while Ritchie and he were doing picket duty, he also had a conversation with Walker, in which Walker asked him why he didn't leave the picket line and find a job. Carson replied that the men were out temporarily, until this thing was settled. Thereupon, Walker told him, that as far as Symns was concerned, "they were out for good." Walker then advised Carson to sneak off the picket line and find employment elsewhere. Walker did not testify, so the above conversations are uncontroverted. I credit Carson's testimony as to these conversations.

Reed T. Ritchie testified that Carson was foreman in name but not in pay, explaining that though Carson had the title of foreman, his pay was the same as that of the witness. Later he corrected this statement saying that he had only seen Carson's pay on one occasion and thought it was the same as his own. He testified that Walker would ask Carson to have something done, and then Carson would come out and ask the warehouse crew to do it. He stated that Carson never forced them to do these things. He testified that if Carson had given him an order that he didn't want to obey, that he would have refused unless he was being "polite" or perform the task "as a neighbor".

On cross-examination Ritchie testified that when he went to work at Symns, Walker told him that Carson was foreman of the warehouse. Walker was away from the warehouse a good deal of the time. On occasion the witness observed Carson give orders

to others. Ritchie stated, that Carson performed manual labor along with the rest of the men, but that in addition to that, he also performed the billing of the company which he performed in a little office.

Harris Ranson testified that he is a truck driver for the company. Wright was the foreman of the warehouse at the time he was employed, and Wright was subsequently replaced by Carson. This witness testified that on certain occasions Carson told him to do certain things, "but he had been told to tell me." He explained that when it was necessary to do something around the warehouse Walker told Carson, and Carson told the men what to do. He stated that the work of the warehouse was largely routine and that Carson needed to direct the men on only rare occasions. Ranson testified that when his truck broke down he took the other truck without consulting Carson. He testified that Carson "was more or less a leadman" explaining that "he would get his orders from Walker, and he would give them to me". On cross examination he admitted that Carson took Wright's place. The witness admitted that Wright gave some orders. Wright would get his orders from McIntyre, and then come out and tell the men when, how and what to do. He admitted that Walker was away a good deal, as he was salesman in addition to being manager.

Both Ritchie and Ranson in their testimony exhibited a desire to assist Carson. Their testimony, on this point was by no means disinterested. I credit

their testimony only in part, as set forth later herein.

10. The Defense of Respondent Symns.

The principal witness for the Respondent was Peel.²⁰ He testified that Mattox and Garrett called on him on November 24. Mattox opened the conference by saying that he would like to talk about the contract which the union had sent to the company. One of the union representatives had a copy of the Symns contract at Salt Lake City which was very close in wording to the contract which Mattox had sent to the company. Peel stated to the union representatives that the company would like to have uniform rates of pay and conditions of work at both Idaho Falls and Salt Lake City; that the company had given a wage increase in August and Peel thought that it was too early for another one. He suggested that the rates of pay then in effect, which were stated in his written proposal to the union, be kept as the present scale. Mattox then said that the contract as regards Idaho Falls was not as good on vacations as the contract at Salt Lake City. Peel replied that the company would make the two contracts conform. In the course of the conversation Peel told the union representatives that if the company granted the wage increase which was asked by the union, and their competitors did not have to pay

²⁰ Callister, attorney for the respondents testified briefly, principally to fix a date, and to deny that he instituted the objection to Lott's participation in the conference of March 27. This denial of Callister is of minor importance, as it is clear that a Symns representative, either Callister or Peel started the objection.

the same increase, that the company would not be able to stay in business, as it couldn't compete. He also told them that the competitive situation of the warehouse at Idaho Falls had become increasingly difficult. He explained that the free delivery of groceries to points 200 miles distant from the company's base was an expense which was making the company's operation at Idaho Falls unprofitable, and that if something wasn't done to remedy the situation, that the company would be out of business. In the discussion of wages Peel explained that they didn't have any "line-drivers" as such and there wasn't any reason to provide for such employees in the contract. Peel told the union representatives that he had suggested a contract in his letter of November 16, and that he was willing to sign a contract embracing the terms of his proposal. He also told them that the Salt Lake City contract would be up for negotiation shortly, and that the company was unable to tell what the wage increase would be at Salt Lake City, so he couldn't tell them what the company would be able to give the employees at Idaho Falls.

Peel testified that the conferees spent considerable time discussing the union shop. The union men extolled the advantages of the union shop, with Peel replying that he had been hearing that for better than nine years, and that the union representatives hadn't succeeded in telling him anything new. Peel said that the conference was friendly, and that as he left Mattox said in a friendly way, "Well, get us some word as soon as you can, but under any

circumstances we are going to have the union shop."

Thereafter Peel heard no more from the union until he received a phone call from Lott in early March. At the start of this conversation Lott asked Peel for a conference and Peel replied that he would be glad to see him after 2:00 p.m. that afternoon, but asked what he wanted to talk about. Lott said he wanted to talk about a contract for Idaho Falls. Peel said that he had an understanding with Mattox and Garrett that these negotiations were going to be settled along with the Salt Lake City proposition. Lott asked Peel about a union shop, and Peel said that they were no closer on that point than they had ever been. Lott then said, "Well, I guess we will have to show our economic strength," and Peel asked him if that was a threat. Lott did not answer that, but said, "I understand they are going to take a strike on the union shop at Salt Lake City and if they win it, can we have **it at Idaho Falls?**" Peel said, "If they have it at Salt Lake City I can see no reason why you shouldn't have it at Idaho Falls." Lott said, "I guess there's not much use in my coming down to talk about these things." According to Peel that was the extent of the conversation with Lott on this occasion.

On March 14, the employees of the company at Salt Lake City struck, and on the following day the employees at Idaho Falls struck. Symns determined to continue operations despite the strike and hired three replacements at Salt Lake City, and a full crew at Idaho Falls.

Peel admitted that the replacements at Idaho

Falls were hired at a rate of pay 6 cents higher than had been paid to the strikers. He explained that on March 15, Scowcroft, at Idaho Falls had granted a 6-cent an hour increase, and Walker, without Peel's authority, had given the same pay raise to the replacements whom he had hired. A similar wage raise was not given to the replacements at Salt Lake City, and Peel did not know the raise had been given at Idaho Falls until 2 weeks later, when he saw the payroll at the end of the payroll period.

Peel testified that after the strike, his first meeting with Representatives of Local 983 was at the conference of March 27 at Salt Lake City. His version of the conference was substantially the same as that given by Lott, which has been set forth previously. The conference of March 27 according to Peel resulted in an agreement on wages and union security, but final settlement was delayed until the following day, over the obstacle of Symns replacements, at which time Peel notified the Industrial Relations Council, that Scowcroft and Utah could settle without Symns.

Peel's testimony as to his conference with Latter on April 6 has been previously set forth.

Peel's version of the conference of April 9, is at some variance with the testimony of Lott as to this conference. Peel testified that his message to the Industrial Relations Council on March 28, offered to settle the strike as to both Idaho Falls and Salt Lake City, on the same terms as Scowcroft and Utah had settled, provided that Symns was not required to discharge the replacements at either Salt Lake

City or Idaho Falls to take back the strikers. At the meeting of April 6 when Latter reported that the replacements at Salt Lake City had quit, he reaffirmed his offer to settle at Idaho Falls on the same terms, and gave Latter until the following Monday, to effect the withdrawal from employment of the replacements at Idaho Falls. Peel testified that on April 9, when the Symns-Salt Lake City strike was settled, he offered to extend the same contract to Idaho Falls, provided only that he would not discharge the replacements to make room for the strikers. However, he offered to reemploy the strikers as openings in employment occurred.

Peel also testified that on or about March 27 when the negotiations at Salt Lake City were entering a crucial stage, he had a telephone call from the Mayor of Idaho Falls. The Mayor asked Peel what could be done to settle the strike of employees at Idaho Falls. Peel told the Mayor that he realized Symns was under a duty to bargain with the Union, even though it had no employees in the warehouse at Idaho Falls at that time. He told the Mayor that he could not go to Idaho Falls at that time, because of negotiations at Salt Lake City, but that very shortly he would go to Idaho Falls. Some few days after the settlement of the strike at Salt Lake City, Peel went to Idaho Falls. He called on the mayor and learned that the mayor had been defeated in a recent municipal election, and was no longer interested in the settlement of the strike. On this occasion Peel also went to the office of Mattox at the Labor Temple. He found that extensive repairs and

remodeling were being effected to the offices of the Union. After some trouble he located the office girls in Mattox's office. They informed him that Mattox was out, and that they did not know when he would return. On the following day Peel again went to the Labor Temple. On this occasion he was informed that Mattox was at Arco, a neighboring city. That ended his efforts to talk to representatives of Local 983. Peel denied that the Mayor had asked Peel to come to Idaho Falls, and the former Mayor did not testify in this proceeding. As to the nature of the telephone call from the Mayor to Peel and the ensuing conversation, I credit Peel's undisputed testimony. I also credit his undisputed testimony as to his visits at the Labor Temple.

Peel testified that in addition to exceeding his authority in giving the replacements a higher rate of pay, Walker had acted without authority, if he had discussed the union with the employees, and if he had stated to striking employees that they would not be reinstated. Peel stated that Walker, as manager, was without authority in those matters.

In general I have credited the version of the various conferences given by Lott, Mattox and Garrett, rather than the version furnished by Peel. The union representatives appeared much more candid than Peel. He appeared to tailor his testimony on occasion to suit the company's needs, as exemplified by his testimony related immediately above, as to Walker's lack of authority. In view of the undisputed evidence that Walker was the Idaho Falls

manager for Symns, I cannot accept this limitation of his authority.

Concluding Findings

In the light of all the credible evidence I find that the strike of the employees at Idaho Falls was an unfair labor practice strike caused by the unfair labor practices of Symns.

As I review the evidence of these negotiations, many points of which are undisputed, I am constrained to conclude that Symns never bargained in good faith, but, on the contrary, sought to nullify by a policy of delay the right of Local 983 to bargain, while by other unfair labor practices it sought to undermine the union. Symns never afforded to its employees or their certified representative the good faith bargaining required by the Act.

At the Local's first approach to bargaining, Walker, the manager at Idaho Falls, informed the Local that Peel at Salt Lake City was the only one authorized to conduct negotiations for Symns. At that point, the Local could have asserted its rights and insisted that bargaining take place at Idaho Falls, but, instead of standing on its rights, it accepted the situation as presented by the company, and instituted negotiations with Peel at Salt Lake City. It may be argued that at that point the Local waived the right to have bargaining at Idaho Falls. As I view the evidence, it made no such waiver. It was seeking good faith bargaining, and accepted the implicit assurance of the company, that Peel at Salt Lake City would afford the union such bar-

gaining. Relying on this assurance, Local 983 then initiated negotiations with Peel at Salt Lake City. This led to the exchange of proposals, the union asking, among other things, a wage increase and a union shop; the company offering only to maintain the status quo, with a minor change of one additional holiday. On November 24, the parties met face to face for the first time in the conference of Mattox and Garrett with Peel.

From all the credible evidence as to this conference it is clear that the local sought a contract, which would implicitly carry recognition of the union. From the tenor of these negotiations it is clear, that the representatives of the local were by no means sure, even at that date, that Symms recognized the Local as the representative of its Idaho Falls employees. In this conference, Peel immediately proposed that all negotiations be postponed until after the Salt Lake City negotiations, on the plea that he desired uniformity of working conditions at Salt Lake City and Idaho Falls. This would postpone negotiations for approximately three months. At that point negotiations had been delayed two months. The representatives of the local opposed this new delay. In the course of the conference, Peel refused to accept the proposed contract of the local as a basis for negotiations, and proposed a contract embodying the existing working conditions. When he insisted that the Salt Lake negotiations should precede the Idaho Falls negotiations, the representatives of the local proposed an interim agreement based on Peel's proposals, which would be ef-

fective until the Salt Lake negotiations were terminated. This proposal of the local representatives, was the reasonable procedure which would lead to uniformity in the Salt Lake City-Idaho Falls agreements, for after the Salt Lake negotiations had resulted in a contract, the Idaho Falls contract could be made to conform to it. Peel would have none of it. At that point the bad faith of the Respondent became manifest. It would not sign a contract for a year on the union's terms, or sign an interim agreement based on its own proposal. Furthermore, it sought delay on the plea that it sought uniformity in working conditions, but it would not agree to give Local 983 whatever benefits were won by the Salt Lake City locals in that negotiation.

Mattox testified that as this conference ended Peel said that he would come to Idaho Falls shortly and continue the negotiations, a statement which was never fulfilled. I credit the version of the conference given by Mattox and Garrett. Peel's failure to go to Idaho Falls is further evidence that the respondent was not in good faith. I do not credit Peel's testimony that no such statement was made by him.

In the negotiations of November 24, Mattox told Peel he would like some offer of a wage increase to take back to the men, who were becoming restive. Peel refused to give Mattox any offer, or assurance of an increase.

On January 6 Lott called Peel. Lott asked Peel if he would consider giving the men at Idaho Falls a raise in view of the skyrocketing cost of living, and the imminent wage freeze by the Wage Stabili-

zation Board. Peel told Lott he would be negotiating with the locals in Salt Lake City, and that he was not interested in whether there would be a wage freeze, nor was he interested in negotiating for Idaho Falls until the conclusion of the Salt Lake City negotiations. This language of Peel constituted an outright refusal to bargain. The Local had a right to bargain with Symns, independently of the Salt Lake City negotiations. Peel unilaterally, and arbitrarily suspended this right, until the conclusion of the Salt Lake City negotiations.

On March 1, the bad faith of the Respondent was further disclosed. On that date, with a strike of the Salt Lake City locals imminent, Lott asked Peel, if the Company would give Local 983 the same contract, as would come out of the Salt Lake City negotiations. Here again, Peel was presented with a procedure which would give his Salt Lake City-Idaho Falls operations the uniformity which he claimed he sought. He refused to commit himself and then, when Lott said that Local 983 would under those circumstances probably strike, Peel said "If you think that your boys will go on strike up in Idaho Falls, why, go right ahead. You don't represent the employees up there anyway. There isn't any of them that belong to the union." So, after the Board election and certification, and all the phone calls, and conferences, Symns had completed the circle of sham bargaining, and now denied the union's majority status and defied it to strike.

Further evidence of the Respondent's bad faith is contained in the pay raise which was granted to

replacements for the strikers, on March 17, 1951. On at least two occasions, Peel had refused to give any wage increase to his veteran employees at the request of their certified bargaining agent. Yet, on the first days of the strike replacements for these employees were hired at a rate of pay 6 cents higher than the strikers were paid, without any consultation with Local 983. In addition to this unilateral pay raise being evidence of Symns' bad faith in bargaining, I find it constitutes an independent violation of Section 8(a)(1) and (5) of the Act.²¹

In his testimony Peel stated that Walker did not have authority to hire the replacements at that wage, and that he didn't know of that fact, until some two weeks later. That is no defense under the circumstances. Walker was Symns' manager, at Idaho Falls, clothed with all the conventional authority of that office. He had authority to hire replacements when the strike occurred, and I find that this authority included authority to determine how much the replacements would be paid. Furthermore, crediting Peel for the moment, when he learned of the raise, Symns did not disavow the act, but continued the raise in effect. Finally, I cannot accept Peel's testimony that he did not know of this raise when it was granted. He alone was directing all negotiations, and he had full control of the Company's labor relations. Certainly he must have known, when, and how, replacements were obtained. That this raise in pay prolonged the strike, is ob-

²¹ NLRB vs. Deena Artware Company, (C.A. 6)—decided July 30, 1952.

vious. When the Salt Lake City locals talked to the replacements at Salt Lake City, those men joined the union and quit Symns. However, when the same proposition was broached to the Idaho Falls replacements, who were paid the higher wage, they refused to resign, so the strike continued.

There are several features of the Local's conduct which gives a semblance of validity to the claim of Symns that the strike was economic in nature. However, this semblance of validity vanishes upon close examination. The first of these features is that the Local was not more vigorous in demanding that negotiations take place at Idaho Falls, and that the negotiations for Idaho Falls proceed immediately, without reference to the Salt Lake City situation. There is no question but that the Local was not firm on those points. However, it sought a contract with Symns. It believed itself dealing with an employer whose good faith was equal to its own. It was willing to inconvenience itself by going to Peel at Salt Lake City, and if agreement on a contract resulted, the inconvenience was of no consequence. At all times it pressed Symns for a commitment as to a contract for Idaho Falls. Symns interposed the Salt Lake City negotiations as an excuse for postponing the Idaho Falls negotiations. It was Symns, whose conduct thus brought the actions of the Salt Lake City Locals, and Local 983 together. On this point too, Local 983 was reasonable and patient. It did not insist that its own negotiations take precedence, but it did insist on at least some commitment. First, the Local sought independent negotiations, and a contract of its own, without regard to the Salt Lake

City negotiations. Peel demurred, interposing the Salt Lake City negotiations. Then the Local asked for an interim agreement based on Peel's proposals. He demurred again, with another reference to the Salt Lake City negotiations. Finally, in view of his frequently stated desire for uniformity as to working conditions at Idaho Falls and Salt Lake City, the Union asked in substance, if it postponed negotiations and a contract, would Symns give the Local the same contract as it would give to the Salt Lake City Locals. When Symns refused to commit itself on that proposition, despite Peel's repeated assurances that the Company sought uniformity in the contracts, the Local concluded that Symns was not in good faith, and took strike action. The Respondent now claims that the patience and forbearance exhibited by Local 983 on these points is evidence that Local 983 was unaffected by the unfair labor practices of the Company, and struck for economic reasons only, at the same time as the Salt Lake City Locals. I cannot accept that proposition. In agreeing to negotiations at Salt Lake City, and in not insisting that the negotiations for Idaho Falls proceed without reference to the negotiations at Salt Lake City, Local 983 was deceived by Peel's representation that he wanted uniformity in the contracts. This representation was proven untrue by Peel's refusal to commit the Company to grant Local 983 the same benefits it would grant to the Salt Lake City locals.

Even when the parties met at the invitation of the U.S. Conciliator on March 27, Symns objected

to the participation of Local 983 in the conference. That action too, belied the Respondent's oft-spoken plea for uniformity in its labor agreements.

For the foregoing reasons, I find that Symns violated Sections 8 (a) (1) and (5) of the Act by (1) failing and refusing to bargain in good faith with Local 983, on and after September 15, 1950; and (2) by instituting a pay increase of its employees without consulting the certified bargaining representative of its employees, on March 17, 1951.

Walker was manager for Symns at the Idaho Falls warehouse, and was clothed with all the conventional authority of such a supervisory official. The Company has denied that Walker had authority for certain conduct toward the employees. I find that contention without merit. Walker was the only supervisory employee of Symns at Idaho Falls. As manager he had unusually complete authority over the operations at that warehouse. According to Peel's own testimony, he rarely went to Idaho Falls, leaving the routine management of that operation almost entirely to Walker. Under the circumstances Symns cannot disavow the conduct of Walker in dealing with employees. I find that Symns, through Walker, committed various acts of interference, restraint and coercion in violation of Section 8 (a) (1) and (3) of the Act. They may be summarized as follows:²²

a. On or about September 22, 1950 Walker had a conversation with employees Graves, Ritchie and

²² These findings are based on the undisputed testimony of employees.

Forbush in which he admonished the men against joining the union, and said that if they didn't like their jobs they could quit.

b. On October 4, 1950, he asked employee Harris Ranson what he thought about the union, and told this employee that Symns would never grant a union shop at the warehouse.

c. On or about January 10, 1951, he told Ritchie that the Wage Stabilization Board was going to permit a 6 cents per hour raise, and that the employees were to be given a raise by the company, and that there was no need of joining up with the union; that the union wasn't any good; that it wouldn't do Ritchie any good; and for Ritchie to stay clear of the union; that he would only be wasting his money in paying it into the union.

d. On April 4 he told Ritchie that he was fired; that if he were Ritchie, he would get out of the picket line, because the union was no good, and Ritchie was only paying money into it, and urged Ritchie to stop picketing.

e. On April 4, 1951, he told Employee Carson that he was "all through" at Symns and urged Carson to leave the picket line and find a job.

f. On March 15, told Carson that Peel would close the doors of the Idaho store before he would grant a union shop to the employees.

Upon the foregoing undisputed testimony I find that Walker on April 4 discharged Employees Carson and Ritchie because of their engaging in union and strike activities, in violation of Sections 8 (a) (1) and (3) of the Act. Walker's conduct could not

be termed a tactical maneuver to get the men back to work. It had an opposite purpose, to discharge the men, to stop the picketing, and to subvert the strike.

Upon all the credible evidence I find that the strike of the Idaho Falls employees on March 15, 1951, was caused and prolonged by the unfair labor practices of Symns.

Since the strike was caused and prolonged by Symns' unfair labor practices, it follows that the striking employees were entitled to their reinstatement upon an unconditional offer to return to work. I further find that on April 9 and 13, 1951, Local 983 made unconditional offers to return to work on behalf of all the striking employees.

It is undisputed that on those dates Lott requested that all the striking employees be returned to work. On April 9, Peel refused the request, stating that he would not discharge the replacements to make room for the striking employees. On April 13, Walker also refused. Since the strike was an unfair labor practice strike, Symns was required under the Act to discharge the replacements and reinstate the strikers.

Lott's offer, on behalf of the union members, to return to work was unconditional. I find, therefore, that Symns violated Section 8 (a) (1) and (3) of the Act, by its failure to reinstate the striking employees on April 9 and 13, 1951.

I find upon all the credible testimony, that Lyle Carson was an employee and not a supervisor. The record on this point is not as clear as might be

desired. As I have previously noted, the employees who testified concerning Carson's duties were prejudiced in his favor, and no substantial evidence was offered by the Respondents to support their contention that Carson was a supervisor. Thus the decision on this point must be based upon the testimony of interested witnesses. I have attempted to evaluate this testimony and to accept it at a proper discount. From all the evidence it is clear that Carson had no authority to hire or fire employees or to effectively recommend the same. Apparently he had no authority to initiate changes in the warehouse routine, or in any other way to exercise his own judgment and initiative. He was paid five cents more than the other warehousemen and truck drivers, which appears to be a very insignificant differential; and he was paid on an hourly basis, the same as other employees. He performed manual labor with the other employees, and in addition performed the duties of a billing and receiving clerk. He had a key to the warehouse. If any man did not perform his work properly Carson reported him to Walker, and thereafter Carson had nothing to do with any disciplinary action. The evidence establishes that Carson was known as foreman of the warehouse. The strongest piece of evidence to the effect that Carson was a supervisor is his testimony as to the conversation he had with Walker on the day of the strike. In that conversation Walker told him that he was "supposed to be a foreman" and was thus not affected by the strike. Carson replied that he was "sticking with the boys and that he might as

well go on strike as be fired for not crossing the picket line." This testimony seems to establish that both Walker and Carson considered Carson to be a foreman, but their estimate of Carson's status is not dispositive of the question of whether Carson is an employee or supervisor, in fact, within the meaning of the Act.

Upon all the credible evidence it appears that Carson was a slightly more valuable, and more trusted employee than the other employees. The 5-cent differential in pay seems indicative of Carson's true status in relation to the other employees. It appears that he was vested with none of the authority which denotes a supervisor within the meaning of the Act.²³ I therefore find that Carson was entitled to reinstatement with the other employees.

Liability of Respondent Idaho

At the hearing it was stipulated that Utah Wholesale Grocery Company agreed on June 13, 1951 on behalf of a corporation to be formed by it, Idaho, to purchase the Idaho Store from Symns. The agreement was the culmination of negotiations be-

²³ Section 2 (11) reads: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of merely a routine or clerical nature, but requires the use of independent judgment." See *Continental Oil Company*, 95 NLRB No. 358; *Hazen and Jaeger Funeral Home*, 95 NLRB No. 1034.

gun on approximately April 13, 1951. The bill of sale transferring the business was signed on July 25, 1951, but dated July 7, 1951.

Thereafter the new owner, Idaho, continued Walker in his capacity as manager, and continued to operate the business with the replacements as its employees. Idaho continued the operations of Symns with the old customers, and such new customers as it acquired.

It was further stipulated by the parties that the sale was bona fide, and that Idaho was a wholly owned subsidiary of Utah Wholesale Grocery Company, a competitor of Symns.

The General Counsel stated also, that he did not claim that the sale was made for the purpose of evading any liability on the part of Symns, and at another time stated that Local 983 had not made any demand for bargaining upon Idaho.

In the course of his testimony Peel stated that in the negotiations for the sale of the Idaho store he represented Symns, and A. B. Smith, general manager for Utah Wholesale Grocery Company, conducted the negotiations for Utah's new subsidiary, Idaho. According to the testimony of Lott, the same individual, Smith, was the representative of Utah, in the labor negotiations which took place at Salt Lake City. Lott specifically mentioned that Smith joined in Peel's objection to his participating in the conference of March 27.²⁴ Also, from the stipulation it follows that negotiations for the pur-

²⁴ The testimony here related is undisputed.

chase and sale were instituted at about the time Lott made unconditional offers on behalf of the employees to return to work. Also, at the time negotiations began, and for some time thereafter, the picketing of the Idaho Store was in full force. The undisputed testimony is that the picketing continued until May 18, 1951.

It is also undisputed that this proceeding against Symns was instituted before the negotiations for the sale of the business began. The original charge herein is dated March 29, 1951. It was filed by the Local in the Regional Office on April 2, 1951. After that date, the charge remained on file at the Regional Office, and this proceeding was at all times pending.

From these facts, and the stipulations of the parties as to the continuance of the Idaho Store by Idaho, I conclude that Utah, the parent corporation, and Idaho, the subsidiary, had knowledge of such facts as would reasonably put them on inquiry as to the unfair labor practices of Symns, and that Idaho had constructive notice of Symns' unfair labor practices, and of this proceeding.

I also find upon all the evidence that the Respondent Idaho is the successor of Symns, and that it has accepted the benefits of Symns' unfair labor practices, has continued Symns' discriminatory labor policy, and has taken no steps to remedy the continuing unfair labor practices. In fact, it has continued to give effect to the unfair labor practices of its predecessor. This is evidenced by the fact that it has installed Symns' former manager Walker, as

its manager, and has accepted as its employees the replacements, employed by Symns, to the exclusion of the striking employees, and their certified bargaining agent, Local 983. Upon these facts, I find that Respondent Idaho is responsible, jointly and severally with Symns for taking the remedial action hereinafter described.²⁵

At the hearing Counsel for the Respondents moved to dismiss the complaint as to Idaho on the ground that its issuance as to that Respondent, violated the prohibition contained in Section 10 (b) of the Act. The motion is denied.²⁶

Counsel for the Respondents on behalf of each Respondent made various motions for the dismissal of the Complaint. All pending motions are hereby denied in accordance with the findings contained in this report.

²⁵ The Alexander Milburn Co., 78 NLRB 747, (cases collated and discussed). Miller Lumber Company, 90 NLRB 1361; N.L.R.B. vs. Colten, 105 F.2d 179, 182. N.L.R.B. vs. Blair Quarries, Inc., 152 F.2d 25 (C.A. 4). Stonewall Cotton Mills, 80 NLRB 325.

²⁶ The Alexander Milburn Company, 78 NLRB 747. See Charles R. Krimm Lumber Company, et al., 97 NLRB No. 242; Indianapolis Wire-Bound Box Company, 93 NLRB No. 875; The L. B. Hosiery Co., Incorporated, 88 NLRB No. 1000; Union Products Co., 75 NLRB 591, Cf. N.L.R.B. vs. Colten 105 F.2d 179, 183 (C.A. 6, 1939) where the Court in denying a contention that the affirmative remedy of reinstatement could not be enforced because of the death of one of the partners, said, "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." See also, McCarron Co., 100 NLRB No. 13.

IV. The effect of the unfair labor practices upon commerce.

The activities of the Respondents set forth in Section III, above, occurring in connection with the operation of the Respondents described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce.

V. The Remedy

It having been found that the Respondent Symns has engaged in certain unfair labor practices, and that the Respondent Idaho is the successor to Symns, and that they are jointly and severally responsible for remedying the said unfair labor practices, it will be recommended that the Respondents jointly and severally, cease and desist from said unfair labor practices, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent Symns has failed and refused to bargain since September 15, 1950, with Local 983, the certified representative of its employees in an appropriate unit, it will be recommended, therefore, that the Respondents on request bargain collectively with the said Local, and if an agreement is reached, embody the same in a written contract.

Having found that the Respondent Symns discriminated in regard to the hire and tenure of employment of Lyle Carson, Charles Graves, Reed T. Ritchie, Donald Forbush, and Harris Ranson, by

discriminatorily refusing, following their participation in a strike, caused and prolonged by Respondent Symns' unfair labor practices, to reinstate these employees to their former or substantially equivalent positions, although they unconditionally applied for such reinstatement, it will be recommended that the Respondents offer to the employees full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

It will also be recommended that the Respondents make whole each of the employees named above for any loss of pay they may have suffered as a result of the discrimination against them. In the case of each employee the back pay period shall begin on the date the discrimination was committed²⁷ and run to the date of Respondents' compliance in each case with the reinstatement provisions herein. Consistent with the policy of the Board enunciated in *F. W. Woolworth Co.*, 90 NLRB No. 41, it will be recommended that the losses of pay be computed on the basis of each separate calendar quarter, or portion thereof, during the appropriate back pay period. The quarter shall begin with the first day of January, April, July, and October; loss of pay shall be determined by deducting from a sum equal to that which each employee normally would have earned

²⁷ The date of the first failure to reinstate was April 9, 1951. Though Carson and Ritchie were discharged by Walker on April 4, 1951, they continued on strike, so can be considered out of the labor market until April 9, 1951.

for each quarter, or portion thereof, his net earnings, if any, in other employment during that period;²⁸ earnings in any one particular quarter shall have no effect upon the back pay liability for any other quarter. It is also recommended that the Respondents be ordered to make available to the Board upon request payroll and other records to facilitate the checking of the amounts of back pay due.

Upon the basis of the foregoing findings of fact and upon the entire record in the case the undersigned makes the following:

Conclusions of Law

1. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.²⁹

2. Respondent Idaho Wholesale Grocery Co. is and has been since July 7, 1951 the successor of Respondent Symns Grocer Co., and as such successor is responsible for remedying the unfair labor practices of its predecessor.

3. All respondents' employees in the Idaho Falls operation, excluding supervisors, as defined in the Act as amended, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act.

²⁸ See *Crossett Lumber Co.*, 8 NLRB 440; *Republic Steel Corp. vs. N.L.R.B.* 311 U. S. 7.

²⁹ Through inadvertence a finding of fact to the same effect was omitted. I so find. The issue was not raised upon the hearing.

4. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL was on September 15, 1950, and at all times thereafter, has been, and is, the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

5. By refusing on September 15, 1950 and thereafter, to bargain in good faith with the aforesaid union, and by granting on March 17, 1951 a pay increase to the employees, without consulting with the said union, the respondent Symns has engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (5) of the Act, as amended.

6. By discriminationg in regard to the hire and tenure of employment of Lyle Carson, Charles Graves, Reed T. Ritchie, Donald Forbush, Harris Ranson, thereby discouraging membership in the aforementioned union, and labor organizations generally, the Respondent Symns has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

7. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent Symns has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

On the basis of the foregoing findings of fact and conclusions of Law, it is hereby recommended that Symms Grocer Co. and Idaho Wholesale Grocery Co., their agents, successors and assigns, jointly and severally, shall:

1. Cease and desist from:

(a) Discouraging membership in Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL or in any other labor organization of their employees by discriminating in regard to their hire or tenure of employment or any term or condition of their employment;

(b) Discriminatorily discharging or refusing to reinstate employees for the reason that they engaged in a strike or concerted activities protected by the Act;

(c) In any other manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to joint or assist Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take, jointly and severally, the following af-

firmative action which it is found will effectuate the policies of the Act;

(a) Offer to Lyle Carson, Charles Graves, Reed T. Ritchie, Donald Forbush, Harris Ranson immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges as provided in the section entitled "The Remedy" above;

(b) Make whole the above named employees in the manner set forth in the section entitled "The Remedy" above, for any loss of pay they may have suffered by reason of the Respondents discrimination against them;

(c) Upon request, bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL as the exclusive bargaining representative of all the employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment, or other conditions of employment, and if an agreement is reached embody such understanding in a signed agreement;

(d) Post at the Idaho store, Idaho Falls, Idaho, copies of the notice attached hereto marked Appendix A. Copies of said notice to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondents' representatives, be posted by the Respondents immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents

to insure that said notices are not altered, defaced or covered by any other material;

(e) Notify the Regional Director for the Nineteenth Region in writing within twenty days from the date of receipt of this intermediate report and recommended order what steps the Respondents have taken jointly or severally to comply herewith.

It is further recommended that, unless the Respondents shall within twenty (20) days from the receipt of this Intermediate Report and Recommended Order, notify the Regional Director for the Nineteenth Region, in writing, that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondents to take the action aforesaid.

Dated this 15th day of September 1952.

/s/ DAVID F. DOYLE,
Trial Examiner

APPENDIX A

Notice to all Employees Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We Will Not discourage membership in Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, or in any other labor organization of our employees, by discriminating in

regard to their hire or tenure of employment, or any terms or conditions of employment.

We Will Not discharge, or discriminatorily refuse to reinstate, any of our employees for engaging in strikes or concerted activities protected by the Act.

We Will Not in any other manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that, such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

We Will offer to Lyle Carson, Charles Graves, Reed T. Ritchie, Donald Forbush, and Harris Ranson immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of discrimination against them.

We Will bargain collectively upon request with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983 as the exclusive representative of all employees in the bargaining unit described here-

in with respect to wages, rates of pay, hours of employment, or other terms or conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees in the Idaho Falls operation, excluding supervisors, as defined in the Act, as amended.

All our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate against any employee because of membership in or activity on behalf of any such labor organization.

SYMNS GROCER CO,

IDAHO WHOLESALE GROCERY
COMPANY

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT,
RECOMMENDATIONS, FINDINGS OF
FACT, CONCLUSIONS AND RECOM-
MENDED ORDER OF TRIAL EXAMINER

Come now the above named respondents, Symns Grocer Co. and Idaho Wholesale Grocery Company, and except to the Intermediate Report and Recommended Order of the Trial Examiner, David F. Doyle, dated the 15th day of September, 1952,

and heretofore filed before this Honorable Board, in the following particulars:

Exceptions to Findings of Fact

1. Except to the finding and statement of the Trial Examiner found on page 8, lines 49 and 50, to the fact that Mattox and Garrett both testified in a forthright manner and their testimony was mutually corroborative, and the Trial Examiner credited their testimony.

2. Except to the findings of the Trial Examiner, page 10, lines 54 and 55, of the statement that Callister, attorney for the respondents, objected to Lott's participation in the conference. There is no reference in the record that Callister represented the respondents in the sense that the Trial Examiner finds. Mr. Lott was present at a meeting of a Salt Lake City group which had always historically bargained separately (R. 115, 116, 117).

3. Except to the findings of the Trial Examiner, page 12, lines 43 and 44, to the effect that Peel on behalf of Symns, objected to the settlement, which objection prevented settlement by the other firms with the union. This is not correct.

4. Except to the finding of the Trial Examiner, page 14, lines 27, 28 and 29, that during all his testimony Lott's demeanor was that of a fair and candid witness. He was biased, and his statements in the record so show.

5. Except to the finding of the Trial Examiner, page 20, lines 44 to 51, inclusive.

6. Except to the concluding findings of the Trial Examiner, page 20, lines 55 to 65, inclusive.

7. Except to the concluding findings of the Trial Examiner, page 21, lines 4 to 20, inclusive.

8. Except to the conclusions stated in the findings of the Trial Examiner, page 21, lines 21 to 55, inclusive.

9. Except to the conclusions and findings of the Trial Examiner, page 22, lines 1 to 11, inclusive. In view of Peel's testimony (R. 18-44, 72-73, 370-375), Peel did not refuse to bargain in good faith as contemplated by the Act.

10. Except to the concluding findings of the Trial Examiner, page 22, lines 20 to 25, inclusive. There is no evidence in the record whatsoever that Peel at any time questioned the majority status of the union for the purpose of using that as a basis for not bargaining. There is no evidence that Symns at any time refused to meet with the union and discuss the contract and the terms thereof.

11. Except to the concluding findings of the Trial Examiner, page 22, lines 27 to 55, inclusive.

12. Except to the concluding findings of the Trial Examiner, page 23, lines 1 to 62 inclusive. There is no evidence in the record to sustain the finding that Symns violated Sections 8 (a) (1) and (5) of the Act by failing and refusing to bargain in good faith with Local 983. The conduct as set forth in the transcript does not constitute failure to bargain in violation of Sections 8 (a) (1) and (5) of the Act.

13. Except to the findings of the Trial Examiner, page 24, lines 1 to 60, inclusive, and particularly do they except to that finding, lines 35 to 40, inclusive, in which it is found that Walker discharged the em-

ployees, namely Carson and Ritchie, because of their engaging in union and strike activities. There is no evidence whatsoever to support such a finding. Respondents more particularly except to lines 42 to 45, inclusive, on page 24, for the reason and on the grounds that there is no evidence to support the finding that the strike of the Idaho Falls employees was caused and prolonged by the unfair labor practices of Symns.

14. Specifically except to the findings of the Trial Examiner, page 25, lines 6 to 43, inclusive. There is no evidence to support the finding that Carson was an employee and not a supervisor. The Examiner supposedly discounted the testimony of Carson for the reason that he found that Carson appeared to be fully conscious of his personal stake in maintaining and proving that he was not a supervisor, and further, that he was evasive on simple questions, the answers to which might tend to establish his supervisory status, and was fulsome in his disclaimers of any real authority in the warehouse.

The Trial Examiner found and recited on page 15, lines 38 to 43, inclusive, that Carson himself testified, as the Trial Examiner found on page 15 of findings, lines 45 to 48, inclusive, and page 16, line 1, that he was given the title of foreman; that he replaced the former foreman when the latter became a salesman in 1949. With this evidence it is error to find that he was not a supervisor.

15. Except to the findings of the Trial Examiner, page 26, lines 45 to 60, inclusive.

16. Except to the denial of the motion of the re-

spondents to dismiss the complaint as to the respondent Idaho on the ground that its issuance as to the respondent Idaho violated the prohibition contained in Section 10 (b) of the Act. This is found at page 27, lines 1 to 5, inclusive.

Exceptions to Conclusions and Recommendations

1. The conclusions found on page 28, lines 21 to 51, inclusive, and on page 29, lines 1 to 62, inclusive, under the caption "Conclusions of Law" and "Recommendations", and page 30, lines 1 to 35, inclusive, subject to the exceptions to the findings of fact taken herein, are not supported by the evidence and are contrary to the evidence and respondents reiterate and reallege and incorporate by reference herein all exceptions heretofore made to the findings of fact upon which said conclusions are based, and said conclusions are improper on the basis of the facts found.

2. The recommendations as set forth on page 29, lines 14 to 51, inclusive, and page 30, lines 1 to 35, inclusive, are based upon findings of fact and conclusions which are not supported by and are contrary to the evidence as stated herein in the specific exceptions to the "Findings of Fact" of the Intermediate Report and respondents, in support of their exception to said recommendation, repeat, reallege, and incorporate by reference said specific exceptions, including that taken on the ground that the findings do not sustain the conclusion.

And For General Exceptions, respondents state

3. That the Trial Examiner was prejudiced and offers in proof thereof the Intermediate Report as compared with the evidence and testimony in the record in the sense that the Trial Examiner disbelieved all witnesses on material points who testified for and on behalf of the respondents, and believed all of the testimony of all of the witnesses on the part of the complainant in toto and without any variation.

Wherefore, respondents respectfully pray that the complaint against them be dismissed, and for such other and further relief as may be just and proper.

Dated at Salt Lake City, Utah, this 24th day of October, 1952.

Respectfully submitted,

/s/ LOUIS H. CALLISTER,

Attorney for Respondents, Symns Grocer Co. and
Idaho Wholesale Grocery Company

To: Louis R. Becker, National Labor Relations
Board, Washington, D. C.

United States of America
Before the National Labor Relations Board

Case No. 19-CA-481

In the Matter of
SYMNS GROCER CO. and IDAHO WHOLE-
SALE GROCERY CO. and TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS UNION, LOCAL No. 983, AFL

DECISION AND ORDER

On September 15, 1952, Trial Examiner David F. Doyle issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent Symns Grocer Co., hereinafter called Symns, had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent Idaho Wholesale Grocery Co., as successor of Respondent Symns, was responsible, jointly and severally, with Respondent Symns, for remedying the latter's unfair labor practices. Thereafter, the Respondents filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the Trial Examiner's rulings made at the hearing and finds that no prej-

udicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the briefs and exceptions, and the entire record in the case and hereby adopts the findings and conclusions and recommendations of the Trial Examiner with the following additions, corrections,¹ and modifications.

1. The Trial Examiner found that Respondent Symns refused and failed to bargain with the Union in good faith, thereby violating Section 8 (a) (5) and (1) of the Act. We agree. However, we find that the initial refusal to bargain in good faith occurred on November 16, 1950, when Symns offered its counterproposal to the Union's first proposed contract, and not, as the Trial Examiner found, on September 15, 1950, when the Union was certified as the bargaining representative of Symns' employees.

2. Respondent Idaho contends that the issuance of any complaint against it is barred by Section 10

¹ We note and correct the following inadvertent errors in the Trial Examiner's report: (1) The conference at which a partial settlement of the Salt Lake City strike was effected occurred on March 27, and not on February 27, as stated at one point in the Intermediate Report. (2) In his "Concluding Findings" the Trial Examiner found that on or about September 22, 1950, Walker had a conversation with three employees including Ritchie. However, the record shows that "Glenn Reed", not Ritchie, was one of the three employees involved in this incident.

We find no support in the record for the Respondents' contention that the Trial Examiner was prejudiced, and that contention is rejected.

(b) of the Act.² We find no merit in this contention.

The original charge in this case, naming Symns alone as respondent, was filed on April 2, 1951, and was served on the same date on Symns. It is not disputed that this charge was timely as to Symns. Thereafter, on January 29, 1951, there was filed and served upon Respondent Idaho an amended charge, which for the first time named Idaho as a respondent. Idaho contends that, as this amended charge was filed and served more than six months after the occurrence of the unfair labor practices found by the Trial Examiner, no complaint should have issued against Idaho, in view of the provisions of Section 10 (b) of the Act.

However, the Trial Examiner in his "Conclusions of Law" made it clear that he was not finding that Idaho had, itself, engaged in any unfair labor practices, but only that Symns had engaged in such conduct.³ Although the Trial Examiner did find that Idaho was responsible for remedying Symns' unfair labor practices, he properly based this finding solely on the fact that Idaho was the successor of Symns. (See paragraph 2 of "Conclusions of Law" in the Intermediate Report.) The Board has held that where a respondent has been found to have engaged

² Section 10 (b) of the Act forbids the issuance of a complaint based on any unfair labor practices occurring more than six months before the filing of the charge and service thereof upon the Respondent.

³ Insofar as the Intermediate Report elsewhere implies a finding that Idaho may itself have engaged in unfair labor practices by failing to take corrective action, we do not adopt such finding.

in unfair labor practices, a successor of such respondent may be held responsible for remedying such unfair labor practices, even though no charge at all has been filed against the successor.⁴

The reason for this is that, while Section 10 (b) of the Act requires the filing of a charge against a respondent in order to initiate a proceeding to determine whether such respondent has engaged in unfair labor practices, the Act makes no such requirement with respect to proceedings to determine the responsibility of a successor for remedying the unfair labor practices of its predecessor. Accordingly, insofar as the instant proceeding relates to the liability of Idaho as the successor of Symns, no charge against Idaho was required. As the filing of the amended charge against Idaho was to that extent a redundant act, the fact that such charge was not filed within the six months' limitation period in Section 10 (b) of the Act is no reason for relieving Idaho of responsibility for remedying Symns' unfair labor practices.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondents Symns Grocer Co., and Idaho Wholesale Grocery Co., their agents, successors and assigns, jointly and severally shall:

1. Cease and desist from:

- (a) Refusing to bargain collectively with Team-

⁴ Autopart Manufacturing Company, 91 NLRB 80, 83.

sters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, AFL, as the exclusive representative of the employees in the following appropriate unit with respect to wages, hours of employment, or other conditions of employment:

All employees in the Idaho Falls operation of the Respondent Idaho Wholesale Grocery Co., excluding supervisors, as defined in the Act.⁵

(b) Discouraging membership in Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL or in any other labor organization of their employees by discriminating in regard to their hire or tenure of employment or any term or condition of their employment;

(c) Discriminatorily discharging or refusing to reinstate employees for the reason that they engaged in a strike or concerted activities protected by the Act;

(d) In any other manner interfering with, restraining or coercing employees, in the exercise of their right to self-organization, to form labor organizations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL or any other labor organization, to bargain collective through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such ac-

⁵ The provisions of paragraph 1 (a) and 2 (c) of this Order apply to Respondent Symns Grocer Co., only insofar as it may retain or reacquire control of the Idaho Falls operation.

tivities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take, jointly and severally, the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Lyle Carson, Charles Graves, Reed T. Ritchie, Donald Forbush, and Harris Ranson immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, as provided in the section of the Intermediate Report entitled "The remedy";

(b) Make whole the above named employees in the manner set forth in the section of the Intermediate Report entitled "The remedy" for any loss of pay they may have suffered by reason of the Respondent Symns Grocer Co.'s discrimination against them;

(c) Upon request, bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, AFL as the exclusive bargaining representative of all the employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment, or other conditions of employment, and, if an agreement is reached, embody such understanding in a signed agreement;⁶

(d) Post at the Idaho store, Idaho Falls, Idaho, copies of the notice attached hereto marked Ap-

⁶ See fn. 5, *supra*.

pendix A.⁷ Copies of said notice to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondents' representatives, be posted by the Respondents immediately upon receipt thereof, and maintained by them for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(e) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of this Order what steps the Respondents have taken jointly or severally to comply herewith.

Signed at Washington, D. C., March 16, 1953.

PAUL M. HERZOG, Chairman

PAUL L. STYLES, Member

IVAR H. PETERSON, Member

[Seal]

NATIONAL LABOR RELATIONS
BOARD

⁷ This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner" in the caption thereof the words "A Decision and Order." If this Order is enforced by a decree of the United States Court of Appeals, this notice shall be further amended by substituting for the aforesaid words "A Decision and Order," the words "A Decree of the United States Court of Appeals, Enforcing an Order."

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

SYMNS GROCER CO. and IDAHO WHOLE-
SALE GROCERY CO.,

Respondents.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings had before said Board, entitled, “In the Matter of Symns Grocer Company, and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, A.F.L.,” and “In the Matter of Symns Grocer Co., and Idaho Wholesale Grocery Co. and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, A.F.L.,” the same being known as Case Nos. 19-RC-648 and 19-CA-481 respectively before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

Case No. 19-RC-648

1. Copy of Petition for certification of representatives filed on August 14, 1950 by Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, A.F.L.

2. Copy of agreement for consent election executed on August 21, 1950 by Symms Grocer Company and Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 983, A.F.L.

3. Copy of Notice of Election issued by Regional Director.

4. Tally of Ballots and certification on conduct of election issued by Regional Director on September 6, 1950.

5. Copy of certification of representatives issued by Regional Director on September 15, 1950.

Case No. 19-CA-481

6. Order designating Martin S. Bennett Trial Examiner for the National Labor Relations Board, dated April 11, 1952.

7. Order designating David F. Doyle Trial Examiner in place and stead of Martin S. Bennett, dated April 29, 1952.

8. Stenographic transcript of testimony taken before Trial Examiner Doyle on April 29 and 30, 1952, together with all exhibits introduced in evidence.

9. Respondents' telegram dated May 14, 1952 requesting extension of time to file brief.

10. Copy of Associate Chief Trial Examiner's

telegram dated May 15, 1952 granting all parties extension of time to file briefs.

11. Copy of Trial Examiner Doyle's Intermediate Report and Recommended Order, dated September 15, 1952, (annexed to Item 17 hereof); order transferring case to the Board dated September 16, 1952, together with affidavit of service and United States Post Office return receipts thereof.

12. Respondents' telegram dated September 30, 1952 requesting extension of time to file exceptions and brief to Trial Examiner's Intermediate Report and Recommended Order.

13. Copy of Board's telegram dated October 2, 1952 granting all parties extension of time to file exceptions and briefs.

14. Respondents' telegram dated October 22, 1952 requesting further extension of time to file brief.

15. Copy of Board's telegram dated October 23, 1952 granting all parties further extension of time to file briefs.

16. Respondents' Exceptions to the Intermediate Report received October 27, 1952.

17. Copy of Decision and Order issued by the National Labor Relations Board on March 16, 1953, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor

Relations Board in the city of Washington, District of Columbia, this 20th day of October, 1953.

[Seal] /s/ FRANK M. KLEILER,
 Executive Secretary, National Labor
 Relations Board

[Endorsed]: No. 14,052. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Symns Grocer Co., and Idaho Wholesale Grocery Co., Respondent. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed: October 26, 1953.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
 the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14052

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

SYMNS GROCER CO., and IDAHO WHOLE-
SALE GROCERY CO.,
Respondents.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 141, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondents, Symns Grocer Co., and Idaho Wholesale Grocery Co., their agents, successors and assigns, jointly and severally. The proceedings resulting in said Order are known upon the records of the Board as "In the Matter of Symns Grocer Company and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, A.F.L., Case No. 19-RC-648"; and "In the Matter of Symns Grocer Co. and Idaho Wholesale Grocery Co. and Teamsters,

Chauffeurs, Warehousemen and Helpers Union, Local No. 983, A.F.L., Case No. 19-CA-481.”

In support of this petition the Board respectfully shows:

(1) Respondent, Symms Grocer Co. is a Utah corporation and Respondent, Idaho Wholesale Grocery Co. is an Idaho corporation, both engaged in business in the State of Idaho, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on March 16, 1953 duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondents, their agents, successors and assigns, jointly and severally. On the same date, the Board's Decision and Order was served upon Respondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondents' Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceedings before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that

this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondents, their agents, successors and assigns, jointly and severally, to comply therewith.

Dated at Washington, D. C., this 23rd day of September, 1953.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National
Labor Relations Board

[Endorsed]: Filed September 25, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In this proceeding, the petitioner, National Labor Relations Board, will urge and rely upon the following points:

1. The Board properly found that respondent Symns Grocer Co. violated Section 8 (a) (5) and (1) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. V, Secs. 151, et seq.), by refusing and failing to bargain in good faith with Local 983, Teamsters, AFL, the certified bar-

gaining representative of its employees, and by instituting a pay increase for its employees without consulting their certified bargaining representative.

2. The Board properly found that respondent Symns Grocer Co. violated Section 8(a) (3) and (1) of said Act by discriminatorily discharging employees Lyle Carson and Reed T. Ritchie, and by refusing to reinstate its striking employees.

3. The Board properly found that respondent Symns Grocer Co. violated Section 8 (a) (1) of said Act by interfering with, restraining and coercing its employees in the exercise of their rights guaranteed by said Act.

4. The Board properly held respondent Idaho Wholesale Grocery Co. jointly and severally responsible with respondent Symns Grocer Co., its predecessor, for remedying the unfair labor practices found.

Dated at Washington, D. C., this 20th day of October, 1953.

/s/ A. NORMAN SOMERS,

Assistant General Counsel, National Labor Relations Board

[Endorsed]: Filed Oct. 21, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
RESPONDENT SYMNS GROCER COM-
PANY INTENDS TO RELY

In this proceeding, the respondent Symns Grocer Company will urge and rely upon the following points:

1. The finding that Lyle Carson was an employee and not a supervisor is contrary to and not supported by substantial evidence on the record considered as a whole, and is contrary to the law in such cases made and provided.

/s/ LOUIS H. CALLISTER,
Attorney for Respondent Symns
Grocer Company

[Endorsed]: Filed Nov. 2, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER OF RESPONDENT SYMNS GROCER
COMPANY TO THE PETITION

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The Symns Grocer Company, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, one of the Respondents above named, hereinafter referred to as "Symns,"

pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 141 et seq.), hereinafter called the "Act," answers the petition presented to this Honorable Court for the enforcement of a certain Order issued by the National Labor Relations Board, hereinafter referred to as the "Board" against Symns, and the Idaho Wholesale Grocery Company, the other Respondent above named, hereinafter referred to as "Idaho", jointly and severally. The proceedings resulting in said Order are known upon the records of the Board as "In the Matter of Symns Grocer Company and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, A.F.L., Case No. 19-RC-648"; and "In the Matter of Symns Grocer Co. and Idaho Wholesale Grocery Co. and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, A.F.L., Case No. 19-CA-481."

In answer to the said petition of the Board Symns admits, denies and alleges as follows:

1. Admits the allegations of Paragraph Number 1 of said petition, except that it denies the commission of unfair labor practices as therein alleged.

2. Admits that the Board on March 16, 1953 issued an Order directed to Respondents, their agents, successors and assigns, jointly and severally, but denies any knowledge or information sufficient to form a belief as to whether the Board was sufficiently advised in the premises or duly considered the matter; admits that on the same date the Board's Decision and Order was served upon Respondents

by sending a copy thereof postpaid, by registered mail to Respondents' Counsel.

3. Denies any knowledge or information sufficient to form a belief as to whether the Board is certifying and filing with this Court a transcript of proceedings as alleged in Paragraph Number 3 of said petition.

4. Alleges that said Order is not now and has never been in full force and effect, and alleges that said Order is invalid and without force or effect by reason of the fact that it is based upon findings which are not supported by substantial evidence on the record considered as a whole and further that said Order is contrary to the law in such cases made and provided.

5. Alleges that the Board acted without and in excess of its powers in making and entering its findings and conclusions of law and said Order in this matter upon the ground and for the reasons that the same are not supported by substantial evidence on the record considered as a whole and are contrary to the law in such cases made and provided.

6. Alleges that the objections that the findings, conclusions and Order were not supported by substantial evidence on the record considered as a whole and were contrary to the law were urged to the Trial Examiner as agent of the Board and also to the Board itself prior to the time that said findings, conclusions, and Order were made and issued.

7. Denies each and every allegation of said petition which is not expressly admitted herein.

Wherefore, Respondent Symns prays that this

Honorable Court set aside the Order of the Board in whole; or, if such prayer be denied that it set aside said order of the Board in such part as the same is not supported by substantial evidence on the record considered as a whole or the law as hereinabove set forth; and, in so far as so set aside, that the Court relieve Symns, its agents, successors and assigns of any necessity to comply therewith.

/s/ LOUIS H. CALLISTER,

Attorney for Respondent Symns
Grocer Company

Duly Verified.

[Endorsed]: Filed Nov. 2, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
RESPONDENT IDAHO WHOLESALE
GROCERY COMPANY INTENDS TO RELY

In this proceeding, the respondent Idaho Wholesale Grocery Company will urge and rely upon the following points:

1. The finding that Lyle Carson was an employee and not a supervisor is contrary to and not supported by substantial evidence on the record considered as a whole, and is contrary to the law in such cases made and provided.

2. The finding that Idaho had knowledge or constructive notice of the alleged unfair labor practices of Symns is contrary to and not supported by sub-

stantial evidence on the record considered as a whole.

3. The denial of Respondent Idaho's motion to dismiss the complaint on the ground that as to said Respondent it was violative of Section 10 (b) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. V, Secs. 151, et seq.) is contrary to the law in such cases made and provided.

4. The conclusion that Idaho is responsible as a successor for remedying the alleged unfair labor practices of Symns is contrary to and not supported by substantial evidence on the record as a whole and is contrary to the law in such cases made and provided.

/s/ LOUIS H. CALLISTER,

Attorney for Respondent Idaho

Wholesale Grocery Company

[Endorsed]: Filed Nov. 2, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

**ANSWER OF RESPONDENT IDAHO WHOLE-
SALE GROCERY COMPANY TO PETITION**

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The Idaho Wholesale Grocery Company, a corporation duly organized and existing under and by virtue of the laws of the State of Idaho, one of the Respondents above named, hereinafter referred to as "Idaho", pursuant to the National Labor Rela-

tions Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 141, et seq.), hereinafter called the "Act", answers the petition presented to this Honorable Court for the enforcement of a certain Order issued by the National Labor Relations Board, hereinafter referred to as the "Board" against Idaho, and Symns Grocer Company, the other Respondent above named, jointly and severally. The proceedings resulting in said Order are known upon the records of the Board as "In the Matter of Symns Grocer Company and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 983, A.F.L., Case No. 19-RC-649"; and "In the Matter of Symns Grocer Co. and Idaho Wholesale Grocery Co. and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, A.F.L., Case No. 19-CA-481."

In answer to the said petition of the Board Idaho admits, denies, and alleges as follows:

1. Admits the allegations of Paragraph Number 1 of said petition, except that it denies the commission of unfair labor practices as therein alleged.

2. Admits that the Board on March 16, 1953 issued an Order directed to Respondents, their agents, successors and assigns, jointly and severally, but denies any knowledge, or information sufficient to form a belief as to whether the Board was sufficiently advised in the premises or duly considered the matter; admits that on the same date the Board's Decision and Order was served upon Respondents by sending a copy thereof postpaid, by registered mail to Respondents' Counsel.

3. Denies any knowledge or information sufficient

to form a belief as to whether the Board is certifying and filing with this Court a transcript of proceedings as alleged in Paragraph Number 3 of said petition.

4. Alleges that said Order is not now and has never been in full force and effect, and alleges that said Order is invalid and without force or effect by reason of the fact that it is based upon findings which are not supported by substantial evidence on the record considered as a whole and further that said Order is contrary to the law in such cases made and provided.

5. Alleges that the Board acted without and in excess of its powers in making and entering its findings and conclusions of law and said Order in this matter upon the ground and for the reasons that the same are not supported by substantial evidence on the record considered as a whole and are contrary to the law in such cases made and provided.

6. Alleges that the objections that the findings, conclusions and Order were not supported by substantial evidence on the record considered as a whole and were contrary to the law were urged to the Trial Examiner as agent of the Board and also to the Board itself prior to the time that said findings, conclusions, and Order were made and issued.

7. Denies each and every allegation of said petition which is not expressly admitted herein.

Wherefore, Respondent Idaho prays that this Honorable Court set aside the said Order of the Board in whole; or, if such prayer be denied that it set aside said Order of the Board in such part as

the same is not supported by substantial evidence on the record considered as a whole or the law as hereinabove set forth; and, in so far as so set aside, that the Court relieve Idaho, its agents, successors, and assigns of any necessity to comply therewith.

/s/ LOUIS H. CALLISTER,

Attorney for Respondent, Idaho

Wholesale Grocery Company

Duly Verified.

[Endorsed]: Filed Nov. 2, 1953. Paul P. O'Brien,
Clerk.

Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-481

In the Matter of
SYMNS GROCER CO. and IDAHO WHOLE-
SALE GROCERY CO. and TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS UNION, LOCAL No. 983, AFL

TRANSCRIPT OF TESTIMONY

Courtroom of the District Court, Bonneville
County Court House, Idaho Falls, Idaho, Tuesday,
April 29, 1952.

Pursuant to notice, the above entitled matter came
on for hearing at 9:45 o'clock a.m.

Before: David F. Doyle, Esq., Trial Examiner.

Appearances: A. C. Roll, Esq., 407 U. S. Court

House, Seattle, Wash., appearing on behalf of General Counsel. Louis H. Callister, Esq., 619 Continental Bank Bldg., Salt Lake City, Utah, appearing on behalf of the Respondents. [1*] Clarence Lott, 456 North Arthur Street, Pocatello, Idaho, appearing on behalf of Teamsters Local No. 983. [2]

Trial Examiner Doyle: Are you gentlemen all ready?

Mr. Roll: Yes, Mr. Examiner.

Mr. Callister: Yes, sir.

Trial Examiner Doyle: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board, in the matter of Symns—Symns—Grocer Co., and Idaho Wholesale Grocery Co., and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local number nine eight three, AFL, case number nineteen CA four eight one.

The Trial Examiner conducting this hearing is David F. Doyle.

Will counsel and other representatives for the parties please *please* state their appearances for the record? For the General Counsel.

Mr. Roll: A. C. Roll—spelled R-o-l-l.

Trial Examiner Doyle: And which Region? Would you give the Region?

Mr. Roll: Nineteenth Region. Four O seven, U. S. Court House, Seattle, Washington.

Trial Examiner Doyle: For the Respondents.

* Page numbering appearing at the top of page of original Reporter's Transcript of Record.

Mr. Callister: My name is Louis—L-o-u-i-s—H. Callister—C-a-l-l-i-s-t-e-r, Salt Lake City, Utah. I am counsel for the Respondents, Symns Grocer Company, and Idaho Wholesale Grocery Company; and we are appearing individually, by that I [4] mean not jointly but as separate Respondents, and have filed separate answers, because we feel the issues are separate and distinct from each other.

Trial Examiner Doyle: For the Union.

Mr. Lott: Clarence Lott, Secretary and Treasurer of Teamsters, Chauffeurs, Warehousemen and Helpers, Local number nine eight-three, Four fifty-six North Arthur, Pocatello, Idaho.

* * * * * [5]

Mr. Roll: May it please the Examiner, General Counsel offers for purposes of identification General Counsel's Exhibit number One, which contains the formal documents in this proceeding.

(Thereupon the documents above referred to were marked General Counsel's Exhibit No. 1-A to 1-O, inclusive, for identification.)

Trial Examiner Doyle: Mr. Roll, although I know you wish to expedite things here, I think we should have an enumeration of the separate documents in the formal file. You can make it very short. Just name the documents, and the designation number. But, there should be some slight description of what each document is.

Mr. Callister: I think so, because if an appeal goes up we must refer to them as such.

Trial Examiner Doyle: That's right, yes.

Mr. Roll: For convenience in future reference,

the General Counsel's proposed Exhibit One contains the following documents: An original Charge, designated as One-A; an Affidavit of Service of the Charge, designated as One-B; an Amended [6] Charge, designated One-C; an Affidavit of Service of Amended Charge, One-D; the Notice of Hearing, designated One-E; Complaint, One-F; Affidavit of Service of Complaint, Notice of Hearing, Charge and Amended Charge, designated One-G; Motion for Bill of Particulars, designated One-H; an Order Rescheduling Hearing, designated One-I; Affidavit of Service of Order Rescheduling Hearing, designated One-J;—This appears to be a duplication, but I think it may as well be included—Motion for Bill of Particulars, designated One-K; Order relating to the Motion for the Bill of Particulars, designated One-L; a Bill of Particulars, designated One-M; Answer by Respondent, Idaho Wholesale Grocery Company, designated One-N; and an Answer by Respondent, Symns Grocer Co., designated One-O.

Mr. Examiner, the General Counsel moves their admission in evidence.

Mr. Callister: We have no objection.

Trial Examiner Doyle: The documents are received in evidence, and will bear the designations as Exhibits in evidence which they do for the purposes of identification, that is, One-A, et cetera.

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A to 1-O for identification, were received in evidence.)

* * * * * [7]

Mr. Roll: Mr. Examiner, during the recess, I believe we are in agreement now upon certain stipulated facts, one of which pertains to the complaint, relating to paragraph two thereof. In the last sentence of the first paragraph of paragraph two, on page two, the complaint states that—Correction. Referring to the second paragraph of the complaint, in the paragraph two, the first sentence, wherein it states, “The Idaho Store annually and particularly during the years Nineteen fifty and Nineteen fifty-one, sold and transported merchandise valued in excess of twenty-five thousand dollars per annum to purchasers situated in states other than the state of Idaho.” that is stipulated to read, “in excess of seventy-five thousand”, instead of “twenty-five thousand.” And, if the Examiner prefers, I would make an interlineation in the formal document.

Trial Examiner Doyle: All right, do that, and I will put [8] “seventy-five thousand” in the duplicate here, and the amendment is granted pursuant to the stipulation.

Mr. Roll: In the course of the hearing I believe both the Respondents and the General Counsel will find it necessary to refer to certain negotiations in Salt Lake City involving a Salt Lake contract between the Teamsters Union and certain operations of these Respondents, among others, in the Utah or Salt Lake area. And for clarification, Mr. Examiner, we would like to stipulate on two dates. First, that there was a Nineteen fifty-Fifty-one contract covering these—covering Symns Grocer Co. and Utah Wholesale Grocery Company, among others,

which was to expire March one, Nineteen fifty-one, and the contract provided for a sixty-day notice to reopen, and that timely notice was given on January one, Nineteen fifty-one. I believe that counsel for Respondents will later wish to amplify the coverage of that contract.

Mr. Callister: I would like to go into it now, if there is no objection, and if I may have the permission of the Court.

Mr. Roll: That's all right.

Mr. Callister: The contract which he is referring to—so we will have the complete background, and not just a portion of it—includes the following named companies, in addition to Symns Wholesale Grocer Company, or, Symns Grocer Company, is the correct title, Utah Wholesale Company (sic), also, as well as John Scowcroft and sons, with their plants [9] in Ogden, Utah, which is approximately thirty-six miles north of Salt Lake City, their plant in Salt Lake City, their warehouse and plant at Price, Utah, which is approximately about a hundred and thirty miles southeast of Salt Lake City, in Utah; and that contract is inclusive of those particular companies, and those locations which I have enumerated.

Mr. Roll: That is agreeable, with the added statement submitted by the Respondents.

Trial Examiner Doyle: That statement is accepted then as the stipulation?

Mr. Roll: That is correct.

Mr. Calister: Yes.

Trial Examiner Doyle: All right, gentlemen.

Mr. Roll: Mr. Examiner, directing your attention to paragraphs nine and ten of the complaint, on page three, counsel will now stipulate that in addition to the appropriate unit being as designated in paragraph nine, that that resulted from a consent election which was held September sixth, Nineteen-fifty, the vote being five to one, and the Union was certified by the National Labor Relations Board September fifteen, Nineteen fifty.

Trial Examiner Doyle: What was that prior date of the consent election?

Mr. Roll: September sixth, Nineteen fifty, vote five to one, and certification September fifteen, Nineteen fifty. [10]

Trial Examiner Doyle: All right.

Mr. Roll: Further, that a union shop election was conducted in this unit on September eighth, Nineteen fifty, the vote being five for, none against, and the certification issued September twenty-five, Nineteen fifty.

Mr. Callister: We will so stipulate, Mr. Examiner.

Trial Examiner Doyle: All right. It is so stipulated. [11]

* * * * *

Mr. Roll: The General Counsel hopes to prove that there were several demands upon Respondent, Symns, prior to the sale to Respondent, Idaho, and that Respondent, Symns, failed and refused to bargain with the certified bargaining agent. That thereafter Respondent, Idaho—the Idaho Wholesale Grocery Company, purchased the operation of the Re-

spondent, Symns, and continued its operation in substantially the same manner and with the same personnel; that it had knowledge of the unfair labor practices, as alleged, that were committed by Respondent, Symns, and that Respondent, Idaho, therefore, assumed successorship liability. And the General Counsel does not contend that a specific demand was made upon Respondent, Idaho, following the purchase from Respondent, Symns.

Trial Examiner Doyle: All right. Now, just a second. I want to line up these dates. I think it might be helpful to me. The sale was on what date?

Mr. Roll: The date was alleged as being in July. The accurate date of the sale, Mr. Examiner, the General Counsel does not have. It is alleged as being the approximate date. Possibly counsel would stipulate?

Mr. Callister: What would you like to stipulate to? [13]

Mr. Roll: The date of the purchase and sale.

Mr. Callister: The information Mr. Peel gives me, Mr. Roll, was that this sale was consummated approximately on or about the first day of July, Nineteen hundred and fifty-one. However, a bill of sale completing the transaction, which was agreed to as of the first day of July, Nineteen fifty-one, was executed on the twenty-fifth day of July, Nineteen fifty-one, but refers back to—that is, the bill of sale, to the seventh day of July, Nineteen fifty-one, with respect to the purchase of the inventory.

Mr. Roll: Refers back to July one?

Mr. Callister: Seventh. But, the agreement actu-

ally was consummated, as far as the meeting of the minds was concerned, the contract, on July the first.

Trial Examiner Doyle: And finally finished the transfer of the business effective July twenty-five?

Mr. Callister: That is correct. It was effective as of July seventh, refering back, but the bill of sale was executed as of July twenty-fifth.

Trial Examiner Doyle: Now, I am just lining up here this strike. According to the papers, this strike, or alleged strike, occurred March fourteen, Nineteen fifty-one.

Mr. Roll: Mr. Examiner, that—the correct date for that is March fifteen, instead of March fourteen. Will counsel so stipulate that that was the date of the strike? [14]

Mr. Callister: Yes.

Trial Examiner Doyle: It is so stipulated. And I will also permit an amendment to the complaint to March fifteen, Nineteen fifty-one.

* * * * * [15]

ROBERT PEEL

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Trial Examiner Doyle): Will you please state your full name and address?

A. Robert Peel—P-e-e-l, Salt Lake City, Utah.

Trial Examiner Doyle: All right.

(Testimony of Robert Peel.)

Q. (By Mr. Roll): What is your position, Mr. Peel?

A. I am president and manager of the Symns Grocer Company.

Q. And where is that located, the principal office?

A. Salt Lake City.

Q. And is that where you spend most of your time? A. Yes, sir.

Q. And, during the year Nineteen fifty, and part of Nineteen fifty-one you had a store situated in Idaho Falls, Idaho, did you? A. Yes, sir.

Q. Was it necessary for you to call at the Idaho store frequently? A. Not too frequently.

Q. About how often did you regularly come?

A. I was there the last just before we moved into that warehouse, [18] and I think that was in Nineteen—in December of Nineteen—or, January of Nineteen fifty. About a year, I think it was just about a year before.

Q. (By Mr. Roll): When was the next time that you came to the Idaho store, from January Nineteen fifty, until when?

A. Immediately after the consummation of the Union negotiations at Salt Lake. That would be, oh, somewhere about April the twentieth, of Fifty-one.

Q. That you next visited the Idaho store?

A. Yes, sir.

Q. When was your first knowledge that the employees at the Idaho store had organized, Mr. Peel?

A. Well, the first knowledge we had was a letter

(Testimony of Robert Peel.)

from Mr. Mattox stating that the employees had organized, and wanted to meet with us to begin negotiations.

* * * * * [19]

Mr. Roll: Mr. Examiner, counsel has indicated a willingness to stipulate that on August fourteen the charging party here, Teamsters Local nine eight-three, wrote a letter to the company at Idaho Falls, on August fourteen Nineteen fifty, wherein the Union demanded bargaining rights, and sought to—sought a date for negotiations.

Trial Examiner Doyle: All right. Just a minute. Why don't you offer it now, and I will receive it. You are going to offer the letter, aren't you?

Mr. Roll: Not this letter.

Trial Examiner Doyle: All right.

Mr. Roll: Counsel is willing to stipulate that such a letter exists, and that there was a reply on August sixteen, [20] indicating the company's desire for a consent election. And, do you so stipulate?

Mr. Callister: Yes, we so stipulate.

Trial Examiner Doyle: All right.

Mr. Roll: Counsel has also stipulated that—

Mr. Callister: I would like, if I may, for the record, and I think it's very important, to read it, if you have no objections.

Mr. Roll: Yes, I have no objection. It's very short.

Trial Examiner Doyle: All right.

Mr. Callister: It's addressed to Mr. Ed Mattox, Idaho Falls, Idaho, and signed by Robert Peel, of

(Testimony of Robert Peel.)

the Symms Grocer Company, and states as follows:

"Dear Mr. Mattox:

"Mr. Walker has sent me your letter of the fourteenth in regard to your claim to represent our employees. In the absence of the usual proof, and under the circumstances we think that you should proceed in the regular specified way by filing your petition with the NLRB requesting an election, and let them hold it as they do in all such instances. We assure you we will cooperate in every way."

Signed "Robert Peel."

And that is two days after the date of the letter which requested representation.

Trial Examiner Doyle: It is so stipulated. * * * * *

Mr. Roll: Mr. Examiner, the Respondents' counsel has stipulated to the admission of a document from the Union to the Company, which purports to be a proposed contract to serve as a basis for negotiations. * * * * *

Mr. Roll: It was submitted by the Union by mail November eighth, Nineteen fifty. Which will be General Counsel's Exhibit number Two.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2, for identification.)

Trial Examiner Doyle: Pursuant to stipulation, it is received, and marked General Counsel's Exhibit Two in evidence.

(The document heretofore marked General Counsel's Exhibit No. 2 was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 2
GROCERY WAREHOUSE AGREEMENT
(1950-1951)

This Agreement is entered into this.....day ofby and between the....., a corporation and Teamsters, Chauffeurs, and Warehousemen and Helpers Union Local No. 983 of the I. B. of T. C. & H. of A., affiliated with the A. F. of L. and Joint Council of Teamsters, No. 67, of Utah and Southern Idaho, hereinafter designated as the Union.

Article I. Appropriated Unit: The employers recognize the Union as the sole and exclusive collective bargaining agency for all employees in the classifications hereinafter set forth.

Article II. Conditions of Employment: Membership in good standing in the Union shall be condition of employment.

For the purpose of this section, tender of the initiation fee on or immediately following the thirtieth (30th) day of employment and tender of the periodic dues uniformly required as a condition of retaining membership shall constitute membership in good standing in the Union.

Article III. Business Agents: The business agent or other duly authorized representative of said Union, Local 983, who may desire to visit the premises of the company shall, before entering said premises or warehouse, received the permission of the management.

Article IV. No Reduction of Rate: No employee, who prior to the date of this agreement, was receiv-

General Counsel's Exhibit No. 2—(Continued)
ing more than the basic hourly rate of wages designated in the schedule contained herein, shall suffer reduction of such basic hourly rate through the operation of said agreement, or because of the adoption of this agreement.

Article V. Seniority: The Company agrees in lay-offs and rehiring of employees to observe the principle of seniority wherever reasonable in the light of efficiency. The company, however, to be the judge of qualifications in such matters. In applying seniority, the employer shall take into consideration length of service, merit and ability of the employee.

Article VI. Holidays: The following days shall be considered holidays and in the event the employee in his normal work week does not work the following holidays, he shall receive his daily straight time hourly pay: January 1, Washington's Birthday, Memorial Day, Fourth of July, Armistice Day, Thanksgiving Day, Labor Day and Christmas Day.

Where, in the normal course of business, the employer finds it necessary to maintain a regular crew that is required to work on Sunday, they shall be compensated under the provision herein set forth for holidays. Employees working as set forth above shall be allowed to work the holiday night after 6:00 p.m. without overtime penalty, providing they receive twenty-four (24) consecutive hours off for the holiday.

Any of the aforementioned holidays, when they fall on Sunday, shall be observed on the date designated as a regular holiday by the State or Nation.

General Counsel's Exhibit No. 2—(Continued)

No work shall be performed on Labor Day prior to six o'clock p.m.

In the event employees are required to work on any of the aforementioned holidays, with the above exceptions, they shall receive their compensation as provided in paragraph one of this article, and in addition there to they shall receive compensation for the hours works at their regular straight time rates of pay. Under no conditions shall this paragraph be interpreted to provide total compensation for the hours worked at more than double time.

Article VII. Wage Scale: The company shall pay the following minimum hourly wage rates:

Shipping and Receiving Clerks and Warehouse Foremen—\$1.55 per hr. [In longhand: 1.33]

Warehousemen, Order Clerks, Checkers and Packers—\$1.45 per hr. [In longhand: 1.28]

Truck Drivers in City: \$1.45 per hr. [In longhand: 1.23]

Line Driver out of City—\$1.55 per hr. [In longhand: 1.17]

Article VIII. Overtime. On work performed in excess of eight (8) hours in any one day or forty (40) hours in any one work week and work performed on Sunday shall be paid at the rate of time and one half. Any employee who reports for work and no work is provided shall receive two (2) hours pay and in the event he is placed to work he shall receive four (4) hours with pay for four (4) hours work; over four (4) hours he shall receive eight (8) hours pay.

General Counsel's Exhibit No. 2—(Continued)

Article IX. Vacations: Employees who have been in the employ of the employer for one (1) year shall be entitled to two (2) weeks' vacation with pay. Employees who have been in the employ of the employer for five (5) years shall be entitled to three (3) weeks' vacation with pay. The vacation time to be taken by the employees shall be at the discretion of the employer; however, the employer will at all times attempt, where possible, to abide by the wishes of the employee as to the time of the vacation. Seniority shall be taken into consideration in determining the vacation period for each employee. Employees entitled to a vacation and who leave the employment for any reason other than dishonesty shall receive a week's pay or two weeks' pay, whichever the employee is eligible for at the time of termination of employment.

Article X. Time Off To Vote: Any employee who is duly registered and qualified to vote in a general election shall be entitled to absent himself from any employment in which he is then engaged or employed on the day of such election for a period of two hours between the time of opening and the time of closing the polls for the purpose of voting in such election, provided that application shall be made for such leave of absence prior to the day of election. The employer shall specify the hours during which the employee may absent himself as aforesaid. Employees who vote within the two hour period allotted above for such purpose shall be paid the straight time hourly rate

General Counsel's Exhibit No. 2—(Continued)
of pay for such two hour period, and such hours shall be considered time worked for purposes of computing overtime.

For purposes of this section "General Elections" are defined as those National and State elections which are held throughout the State on the first Tuesday after the first Monday in November of each even-numbered year, and the first Tuesday after the first Monday in November of such other years as may be provided by law.

Article XI. Riders: No driver shall allow anyone, other than a fellow employee assigned to duty, to ride on his truck and/or trucking equipment, except upon permission by an authorized official of the company.

Article XII. Arbitration: In case of any dispute or misunderstanding concerning the application or interpretation of the provisions of this Agreement, which cannot be adjusted by conciliation between the parties to this Agreement, the same may be referred by either party hereto, within five (5) days, to a Board of Arbitration, accordance with the following procedure.

Either party shall notify the other party of its desire for the appointment of a Board of Arbitration, and within five (5) days the Company and the Union shall each select two members who shall act on the Board of Arbitration and the four so selected shall select a fifth member. If the four members cannot agree upon a fifth member within five (5) days such fifth member shall be selected by the Fed-

General Counsel's Exhibit No. 2—(Continued)
eral Mediation and Conciliation Service. The Board of Arbitration consisting of five members shall meet within five (5) days after the selection of the fifth member and shall conduct hearings and receive testimony relating to the misunderstanding of dispute, and shall submit their findings and decision within five (5) days, exclusive of Sundays and Holidays, after completion of the hearing. The decision of the Board shall be final and binding on both parties to this Agreement.

The expense of the fifth member acting as arbitrator shall be divided equally between the parties to this Agreement.

It is understood that the Board of Arbitration shall not have the authority to change, alter, modify, or add to any of the terms or provisions of this Agreement.

Article XIII. Discharge: The company reserves the right to discharge any man in its employ, it being understood that no employee shall be discharged or discriminated against for being a member of the union, or for union activities.

Article XIV. This Agreement shall become effective.....and shall remain in effect until theday of.....and shall thereafter automatically renew itself from year to year, except that in case of either party desiring to change or terminate it, they shall submit their desire in writing to the other party sixty (60) days previous to the annual expiration date.

In Witness Whereof, said parties to the agree-

General Counsel's Exhibit No. 2—(Continued)
 ment have hereunto set their hands and seals the
 day and year first above written.

Company: By

TEAMSTERS, CHAUFFEURS & HELP-
 ERS, LOCAL, AFL 983

By

Approved by:

Mr. Roll: And a reply by the company to Mr. Mattox, dated November sixteen, Nineteen fifty, in the form of a letter signed by Robert Peel, which purports to be a counter-proposal submitted from the company to the Union. [22]

Trial Examiner Doyle: You are offering it in evidence?

Mr. Roll: That will be General Counsel's Exhibit number Three.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3, for identification.)

Trial Examiner Doyle: Pursuant to the stipulation, it is accepted.

(The document heretofore marked General Counsel's Exhibit No. 3 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 3

(Copy)

E. J. Mattox, November 16, 1950
P.O. Box 1177, Idaho Falls, Idaho

Dear Mr. Mattox:

In connection with yours of November 8th submitting proposal for contract with the warehouse employees at Idaho Falls, we have the following comments to make.

Article 2 we are not agreeable to as we do not believe that any man need necessarily belong to the union as a conditions of employment.

Article 7 we are agreeable to writing in the present wages we granted in August:

Shipping and/or Receiving Clerks and Checkers:
\$1.22.

Cash & Carry Men, Order Runners, Stackers, Pilers, Warehousemen: \$1.17.

Truck Drivers: \$1.17.

Beginner's Rate: \$1.11.

Article 8 overtime we suggest you work "all work in excess of 40 hours in any one working week and work performed on Sunday to be paid at the rate of time and one-half."

Article 9 in order to conform with our present practice and the contract in effect with our Salt Lake employees we are agreeable to granting vacations at the rate of one week after one year and two weeks after three years.

Article 12 arbitration we prefer not to enter into

General Counsel's Exhibit No. 3—(Continued)
any such agreement as we believe we can settle our own problems with the union to better advantage.

Article 6 in the matter of holidays while we do not recognize Armistice Day we believe the situation to be slightly different in Idaho and it is most generally recognized in the outlying territory. As there would be less confusion there we are therefor, agreeable to recognizing Armistice Day inasmuch as July 24th is not a recognized holiday in Idaho although it is in Utah. This would have the effect of making the same number of holidays to the employees at Idaho as in Salt Lake.

In the matter of line drivers we have no such employees. We do have one or two drivers who make short trips out of the city but they are only for a day or a day and a half at a time and the rest of the week they are employed within the warehouse. To make a distinction would cause endless confusion. We offer this in order to clarify the situation as far as your thinking may be concerned.

Yours very truly,

SYMNS GROCER COMPANY

.....

Robert Peel

Q. (By Mr. Roll): During the latter part of Nineteen fifty, Mr. Peel, did you have a local manager here in Idaho Falls, managing your local store? A. In Nineteen fifty?

(Testimony of Robert Peel.)

Q. Yes. A. Yes, sir.

Q. Would you state his name, please?

A. You say the latter part of—

Q. Yes, during the period of the exchange of this correspondence, we will say from August Nineteen fifty up to April of Nineteen fifty-one.

A. Mr. E. C. Walker.

Q. Was Mr. Walker authorized by you to engage in collective bargaining negotiations?

A. No, sir.

Q. Did you reserve that exclusively to yourself?

A. I did.

Q. (By Mr. Roll): Will you state the approximate distance between Idaho Falls and Salt Lake City?

A. I think it's about two hundred and thirty-five miles.

Q. That is by automobile? A. Yes.

Q. And I believe you testified that you did not come to Idaho Falls during that period?

A. I don't recall coming up during that time.

Q. Did you receive personal contacts from Union representatives representing Local nine eighty-three, in Salt Lake? A. Yes, sir.

Q. How many such contacts did you receive?

A. I had one contact, I think it was in the early part of January, and that was Mr. Mattox accompanied by Mr. Garrett. Mr. Garrett is with the Local two twenty-two, in Salt Lake City.

Q. Now, without going into detail—I am sure your version will be fully covered by your counsel—

(Testimony of Robert Peel.)

do you think that was the first one, Mr. Peel, or might there not have been an earlier contact?

A. There was no other one that I have any recollection of.

Q. All right. You have set that as early in January. Then, did you receive another contact from some Union official?

A. Yes, not in person, however. [24]

Q. (By Mr. Roll): Who was that?

A. I received a phone call.

Q. Who was that?

A. Why, the gentleman said his name was Lott. I didn't see him.

Q. And about what date was that?

A. That would be in the very early part of March.

Q. All right. Any others?

A. Well, then, there were other—there were two other meetings, and I don't know just what the dates were, in the Industrial Relations Council offices, in which Mr. Lott and Mr. Mattox were in attendance.

Q. Now, you are referring now to meetings of negotiations concerning the Salt Lake contract, rather than the Idaho Falls contract?

A. The Idaho Falls was a part of that consideration.

Q. With respect to those negotiations, do you recall the approximate date that the Salt Lake negotiations began?

(Testimony of Robert Peel.)

A. Well, my guess is that they had began about the first of January.

Q. About the first? A. Uh huh.

Q. Do you know approximately—the approximate number of meetings that were held until a contract was concluded? A. At Salt Lake?

Q. (By Mr. Roll): Yes.

A. With the Salt Lake Union?

Q. Yes.

A. They were so numerous that I wouldn't pretend to even give you a guess on that.

Q. You did not attend all of those meetings, did you? A. All but one.

Q. Oh, did you? Can you tell me which meeting you missed?

A. I think it was the first one in which Mr. Lott and Mr. Mattox were there. That meeting was continued until the following day. I was there the following day; I was not there the first day.

Q. Would that be March twenty-seventh, would you recall — March twenty-sixth, rather, and they were there on March twenty-seventh of Nineteen fifty-one (sic)?

A. No, I think it was earlier than that.

Q. Very well.

A. I think the strike was settled down there on March the twenty-seventh. I know that it was some time prior to that.

Q. That's sufficient. By the way, do you know Mr. Smith?

A. Of the Idaho Grocery Company?

(Testimony of Robert Peel.)

Q. Yes; Mr. A. B. Smith? A. Very well.

Q. Will you state what his position is?

A. Well, I don't know his corporate position, but I know that [26] he is general manager of the Utah Wholesale Grocery Company.

Q. (By Mr. Roll): Is Mr. Smith the man with whom you negotiated the sale of the Idaho Falls store? A. Yes, sir.

Q. About what date did those negotiations begin?

A. Well, I—it's hard to tell when negotiations begin, because the way the business was disposed of we had no idea that we were necessarily going to find a buyer as a going business. So, we asked brokers to contact some people, different people, and they, in course of that, they contacted Mr. Smith. And that was, oh, fully, I would say, seventy days before the consummation of the deal.

Q. Now, the deal, I believe we said, was consummated July one. You would fix that then, the initial contact, something over two months prior to that?

A. Yes, it was a little over two months.

Q. It would be about the month of May, latter part of April or early May?

A. I think that is it.

Q. Of Nineteen fifty-one?

A. Yes. You see, I don't know just when they contacted him definitely.

Q. Had you not discussed it with him earlier, even before the brokers had contacted him?

A. Well, we talked about it I would say about

(Testimony of Robert Peel.)

three years [27] before that time, but at that time he said if we ever wanted to sell that branch, would we give him an opportunity. Now, that's about as far as that conversation went.

Q. (By Mr. Roll): And you agreed that you would, didn't you? A. Yes.

Q. And following that time was this a matter of conversation upon occasion, whether you were ready to sell, or whether he was still interested?

A. Well, I don't think we ever discussed it with anybody between those two dates.

Q. Was he the only individual in Utah Wholesale Grocery Company with whom you discussed the purchase? A. Yes.

Q. Were you—was your payment for the business by check? A. By check.

Q. What check was the—what checking account was that check drawn on?

A. It was drawn on the First Security Bank of Utah, I think, N A, that one.

Q. Was that the Utah Wholesale Grocery Company checking account, it was, wasn't it?

A. Well, I think so.

Mr. Callister: Well, there is no question, is there, Mr. Roll, that the Utah Wholesale Grocery Company purchased it, and then formed an Idaho corporation? I will so stipulate [28] that those are the facts.

Mr. Roll: That's fine.

Trial Examiner Doyle: It is so stipulated.

Q. (By Mr. Roll): Did you keep a personal

(Testimony of Robert Peel.)

record of the negotiation meetings and the dates that—upon which you attended?

A. No, sir.

Q. Mr. Smith also attended those negotiation meetings, didn't he?

A. Well, he was there most of the time.

Q. He representing Utah Wholesale Grocery, and you representing the Symns Grocery Company?

A. Yes, sir.

Q. At the time that—strike that, please. Do you recall Mr. Lott sitting in on those negotiations?

A. Twice.

Q. Do you recall any objection being made to his participation?

A. I never objected to any, and I never heard of anybody else.

Q. When he participated in those negotiations was he participating in behalf of the Idaho Falls Local Union that represented your employees at Idaho Falls?

A. Why, I don't know who else he could have been representing, I am sure. [29]

Mr. Callister: Well, just answer the question. Well, that's all right.

Q. (By Mr. Roll): Did you consider then that those negotiations between you as one party, and Mr. Lott as another, were binding upon you?

A. Certainly.

Q. And were you bound by the conclusion of those negotiations at Salt Lake for your Idaho store?

A. I expected to be.

(Testimony of Robert Peel.)

Q. There was a strike, was there not, in your Utah operation, as well as the Idaho store?

A. Yes, sir.

Q. Were you requested to take back your striking employees at Idaho Falls? A. Yes, sir.

Q. What was your reply?

A. I was requested twice to take them back; once by Mr. Latter——

Mr. Callister: Who is Mr. Latter? So the record will show.

A. Mr. Latter is at the head of Local two twenty-two. And he came to see me——

Q. (By Mr. Roll): Let me interrupt. Mr. Latter was—Local two twenty-two was the Salt Lake Union, and he was also a representative of the Salt Lake Joint Council of the Teamsters, [30] isn't that right?—of which the Idaho Falls Local is a part?

Mr. Callister: We will so stipulate.

A. I haven't any idea about that, but——

Mr. Callister: It is a fact, and we so stipulate.

A. ——Mr. Latter——

Trial Examiner Doyle: All right. Just a minute. It is so stipulated. His name is Latter?

A. L-a-t-t-e-r.

Mr. Callister: Fullmer H. Latter.

Mr. Roll: L-a-t-t-e-r.

Trial Examiner Doyle: Fullmer?

Mr. Callister: Yes, F-u-l-l-m-e-r.

A. Do you want me to proceed?

Trial Examiner Doyle: Yes.

A. Mr. Latter came to see me—I can refresh

(Testimony of Robert Peel.)

my memory on it there. It was on a Friday (examining documents). Would be April sixth——

Q. (By Mr. Roll): All right.

A. ——Nineteen fifty-one. Mr. Latter stated that he was representing the Idaho Falls people; and he asked me if we were prepared to settle the Salt Lake strike. That strike had—the settlement of that strike had been held up because we had employed people that they wanted us to discharge. On that day those people had left us, and there was nobody there, so that was no longer a question. And Mr. Latter asked me if we couldn't [31] settle it, and I said, "Yes." And then he said, "How about Idaho Falls?" and I said, "Well, we will settle there, too, on the same basis." But, at Idaho Falls we had a full crew of men, and Mr. Latter asked me if we would discharge those men, and I said, "No," but that I would take those men back as fast as the opportunity presented itself.

Q. (By Mr. Roll): In other words, it was your position that you would not replace the men who were replacing the strikers with the strikers?

A. Yes, that's right.

Q. At that time? A. Yes.

Q. That is, you would not replace the striking employees? A. Yes.

Q. Now, what was the next request?

A. The next request—what do you mean, will you tell me, the next request for what?

Q. I understood you to say there were two occasions.

(Testimony of Robert Peel.)

A. Oh. Then we were called into a meeting the Monday following that—that was Friday, and we were called into a meeting Monday by the Government Conciliator, and Mr. Lott and Mr. Mattox were there, along with other people. And there we arranged a settlement of the Salt Lake strike, and they asked me again if I would re-employ the people at Idaho Falls. I told them that I would discharge nobody, but I would take the [32] men back as soon as vacancies occurred.

Mr. Callister: I wonder if I may just ask Mr. Peel, Mr. Roll, this:

Mr. Roll: Yes.

Q. (By Mr. Callister): Was Mr. Latter present at this meeting on Monday?

A. Yes. Mr. Latter—do you want me to give you those present?

Q. (By Mr. Callister): Yes, if you will, please.

A. Mr. Latter, and Mr. Bailey—Mr. Bailey is with Local two twenty-two—Mr. Thoreson—T-h-o-r-e-s-o-n, and Mr. Hampton of the Industrials Relations Council, Mr. Johnson, the Government Conciliator, myself, Mr. Mattox, and Mr. Lott. That's to the best of my recollection who was there.

Q. (By Mr. Roll): Were those some people present at the earlier meeting that you set as being April sixth?

A. April sixth, that meeting was between Mr. Latter and myself alone in my office.

Q. I see.

A. At about nine o'clock in the morning.

(Testimony of Robert Peel.)

Q. Very well. Did you not at that last meeting on April ninth condition any further bargaining upon the Union, meaning nine eighty-three at Idaho Falls, signing up a majority of those people then working who had replaced the strikers?

A. I never at any time made such a statement.

Q. (By Mr. Roll): Did you not suggest to them that—by “to them” I mean Nine eighty-three Union representatives, Mr. Lott and Mr. Mattox, that they come up and talk to the employees at the Idaho Falls store?

A. I did not. Can I explain that?

Q. Certainly, if you wish.

A. Mr. Latter came to me when these strike—or, these fellows who were working at our place had left, and he said—

Mr. Callister: Where is that, at Salt Lake?

A. At Salt Lake. Then he said to me, “About Idaho Falls,” he said, “I think—will you give me a little time in Salt Lake to get this thing settled before you re-hire?” I said, “How long do you want?” He said, “Until Monday morning.” I said, “That will be satisfactory. But, remember, we are out of business, and we can’t stay closed too long.” Mr. Latter said, “I think I will go to Idaho Falls, and see if I can’t get it straightened out.” That was at nine or nine-thirty in the morning. About noon he called me, and said, “I can’t go to Idaho Falls, but will you let the Union people at Idaho Falls talk to those men in your warehouse?” And I phoned Mr. Walker authority to let them in to talk.

(Testimony of Robert Peel.)

I told him to take no part in it, and to not be present. And they took an hour and some minutes of our time to talk to them. I didn't suggest it.

Q. One other thing, Mr. Peel—do you know the mayor of Idaho Falls? [34] A. Yes.

Q. (By Mr. Roll): Did you receive a telephone call from him? A. I did.

Q. Was that during the course of the strike at the Idaho Falls store?

A. Yes, it was towards the last end of it.

Q. Did he tell you that the purpose of his call was to endeavor to get you to come to Idaho Falls to meet with the Union?

A. He told me that the Union had come to him to see if he could help them to get the strike settled up.

Q. Didn't he tell you, Mr. Peel, that the Union came to him and asked him to intervene to see if he could not get you to come to Idaho Falls and meet with the Union, in an attempt to settle the thing?

A. He never told me that. I told him, however, that I would come up as soon as I could get away.

Q. Did you come? A. Yes, sir.

Q. Did you contact the Union officials?

A. I tried twice. Their office was all torn up over there, they were *renovising*; I tried one evening, and I couldn't find anybody over there, and went back the following day, and asked—they said Mr. Mattox had not been in that morning, and I asked them where he was, if I could locate him, and

(Testimony of Robert Peel.)

they [35] said no, they thought he had gone to Arco, and there was no way of locating him.

Q. (By Mr. Roll): Did you make any attempt to seek an appointment with the Union prior to the time you came? A. No, sir.

Mr. Roll: Mr. Examiner, may we have a brief recess?

Trial Examiner Doyle: All right. Five minutes?

Mr. Roll: Yes.

(Short recess.)

Trial Examiner Doyle: The hearing will be in order.

Mr. Roll: Mr. Examiner, I would like at this time to propose another stipulation with counsel, that the Salt Lake settlement agreement of the Salt Lake strike, and the Nineteen fifty-one contract provided that the strikers would replace the strike-breakers. Is that correct, for all operations, except Symns Grocer Company?

Mr. Callister: Well, now, frankly, Mr. Roll, you have me there. I don't know. The reason I don't know is I wasn't participating, and I don't know. I am sorry. If that is a fact—if you say that is a fact, I will be happy to stipulate to it.

Mr. Roll: I take it Mr. Peel would know.

Trial Examiner Doyle: Of course, the best evidence would be a copy of that agreement.

Mr. Roll: The agreement with respect to reinstatement of [36] strikers was an oral agreement, other than the contract which had been worked out, Mr. Examiner.

(Testimony of Robert Peel.)

Trial Examiner Doyle: All right.

Q. (By Mr. Roll): It is correct, isn't it, Mr. Peel, that the reason that you did not sign the contract at the same time that the other grocery operators signed in Salt Lake, was that the other operators agreed to replace the strikebreakers with the striking employees, isn't that right?

A. No, sir. We were the only ones that I knew of that had strikebreakers at the time of the settlement, except that Scowcrofts had one man. And there was a squabble over him, too, and I don't know what that finally resulted in.

Mr. Callister: Now, in the stipulation that you asked me, Mr. Roll, so that there will be a full picture, when you refer to the Salt Lake negotiations, or the Salt Lake contract, we must bear in mind the fact that the contract included Price, Utah, which is a hundred and thirty-five miles southeast, and Ogden, Utah, which is thirty-five miles north. In other words, when you refer to the Salt Lake agreement, it didn't just refer to plants in Salt Lake City metropolitan area, it referred to these other plants of employers involved.

Mr. Roll: Would it be less confusing if I would refer to it as the Utah agreement, rather than the Salt Lake agreement?

Mr. Callister: Well, we will have to—I don't think it [37] will be necessary—we always refer to it as the Utah-Idaho agreement, because it included, under our contention, the Idaho Falls the same as it did Price and the same as it did Ogden.

(Testimony of Robert Peel.)

Q. (By Mr. Roll): Mr. Peel, isn't it correct that the Utah Wholesale Grocery Company had people replacing the striking employees?

A. I don't know; I can't answer that. They had some at one time, I knew, but I didn't think they had any when the strike was settled up.

Q. Aren't you aware that the condition upon which the Union accepted the agreement, to which we have been referring, was that the men then on the job would be replaced by the striking employees, isn't that the fact?

A. No.

Q. And that you said you would not do that, because you would not replace your employees who were working, with the men on strike, isn't that right?

A. You will have to restate that question. That's too involved for me.

Q. Isn't it a fact that you, at the time the other operators signed, and settled the strike in Salt Lake, refused, and the only reason you refused to accept the same agreement was because you would not replace your employees, who were working, with the strikers? [38] A. Yes.

Mr. Callister: Now, wait a minute. The agreement that you are referring to did not incorporate a provision providing that those who replaced strikers during the strike must be discharged, did it?

Mr. Roll: I have already stated, counsel, that that was an oral agreement on which the Union accepted the contract as offered.

(Testimony of Robert Peel.)

Q. (By Mr. Roll): And that is correct, is it not, Mr. Peel?

A. The Union wouldn't accept our contract until we had replaced them.

Q. That's right. And they wouldn't accept the others until they had agreed to replace those who were working with the strikers?

A. Yes, despite the fact that they couldn't replace them.

Q. Well, now, I don't know what you mean by that.

A. Well, there was six men went out, and three came back.

Q. So that, then, is the only reason why you did not sign at the same time with the other operators, isn't that correct?

A. Well, I was willing to sign, but the Union wasn't.

Q. No. Isn't it correct that the only reason you did not sign at the same time that the other operators signed, was because if you had signed you would have had to replace the people who were then working in your operation with the people who were then on strike, and you refused to do that? [39]

A. I refused to discharge anybody that was in our employ.

Q. (By Mr. Roll): That's right. Now, that's the reason why you didn't enter into the same contract at the same time that the other operators did, isn't that correct?

(Testimony of Robert Peel.)

A. That's the reason the Union wouldn't enter into a contract with me.

Q. Well, stated another way—had you been willing to replace the people who were working with those who were on strike, you would have signed the contract at the same time the other operators signed, isn't that correct? A. I think so.

Q. Then, you agree that that was a condition to signing that contract, that the strikers replace those who were working, to the extent that they wanted to go back, that's correct, isn't it?

A. Well, there weren't any there.

Q. Will you answer my question Yes, or No? That was the agreement, was it not, that the striking employees would have the right to go back on the job, if they wanted to, and replace those who were working if necessary?

A. That isn't true. There wasn't anybody there to replace; they had left us.

Q. I am not talking about your operation, Mr. Peel, I am talking about the other operators. When they signed the contract that was the agreement, that the other operators would [40] put back the striking employees, replacing those who were working, if necessary?

A. I never heard that question discussed among them.

Q. (By Mr. Roll): Do you recall the approximate date that you raised the wages of the employees at the Idaho Falls store in Nineteen fifty-one?

A. It would be March the fifteenth. Well, I am

(Testimony of Robert Peel.)

not sure but what there was a raise before that. But, what—are you trying to limit it?

Q. Can you state the date that the raise went into effect?

A. Well, now, I think that there was a raise before the strike, and there was one on March the fifteenth, the day after the strike.

Q. There was one on March fifteen, the day of the strike? A. March fifteenth.

Q. Can you tell me about how much raise that was? A. The one on March fifteenth?

Q. Yes. A. Six cents.

Q. That was a retroactive increase, was it not?

A. Well, I don't know, I don't think there was anything retroactive—no, there wasn't any retroactive part about it.

Q. What was the date that you had previously raised wages?

A. August the first, Nineteen fifty.

Q. Now, the March Nineteen fifty-one raise required [41] approval of the Wage Stabilization Board, did it not?

A. It came about under that—I don't know what you call it—the six—you know, they froze salaries or wages there for a while, and then they give us permission to make some sort of an adjustment.

Q. (By Mr. Roll): Did you petition the Wage Stabilization Board for authority to grant the increase?

A. Not at that time. I don't think that was necessary.

(Testimony of Robert Peel.)

Q. Then your March fifteen, Nineteen fifty-one increase was given without the authority of the Wage Stabilization Board? A. I think so.

Q. What was your pay period, Mr. Peel, at Idaho Falls, did you pay by the week, two weeks, or by the month, or how?

A. Semi-monthly, on the fifteenth, and the last day.

Q. Was that the—was that the same as Salt Lake? A. Yes, sir.

Q. Now, at the time you gave the increase did you consult with the Union? A. No, sir.

Q. Had the Union earlier demanded an increase of you?

A. Well, they demanded, yes; they demanded a dollar and forty-five cents an hour. I don't know whether that was before or after, though. I guess it was before.

Q. It was before, wasn't it?

A. Yes. [42]

Q. (By Mr. Roll): That's right. And at that time you refused to grant an increase at the request of the Union, didn't you? A. Yes.

Q. Uh huh.

A. I didn't have any—I couldn't have done it if I wanted to.

Mr. Roll: I think that's all.

Cross Examination

* * * * * [43]

Q. (By Mr. Callister): Now, Mr. Peel, this six

(Testimony of Robert Peel.)

cents was given, as you state, on March the fifteenth. A. Yes.

Q. Was that after the strike had commenced?

A. Yes.

Q. In other words, this pay raise, or this six cents was given to the employees who replaced the strikers or took their jobs, is that right?

A. That's right.

* * * * * [46]

Q. (By Mr. Callister): Now, Mr. Peel, you referred to a Mr. Johnson, the Government Conciliator, in your meetings at Salt Lake City.

A. Yes, sir.

Q. Now, who was Mr. Johnson? Lyle S. Johnson, that's his name, isn't it?

A. Well, it was Lyle Johnson.

Q. Yes. [48]

A. And he is the Government Conciliator. At least he held himself out to that, and attended these meetings, and called these meetings.

Q. (By Mr. Callister): You say he called these meetings? A. Yes, sir.

Q. When did he come into the negotiations, do you recall?

A. No, I have no way of knowing that.

Q. Well, was it approximately the month of January, or February, of Nineteen fifty-one?

A. No, I would say it was, oh, perhaps along the first of March, when the thing was beginning to get tough.

Q. Now, who were you represented by, Mr. Peel?

(Testimony of Robert Peel.)

A. Who were we represented by?

Q. Yes. A. In those meetings?

Q. Uh huh. A. I was representing them.

Q. I see. And Mister—did Mr. Johnson call the meetings, as the Government Conciliator?

A. Well, I don't know that he called them all. He called the last one, I know.

Q. But he attended——

A. He attended there, he was in attendance there. And I presume the natural course of things would be to call them through the Industrial Council, at his request, or the Union, [49] or somebody else.

Q. (By Mr. Callister): And who was it—who was the Industrial Relations Council?

A. Well, it's an organization of business firms in Salt Lake that are trying to do something in the labor field.

Q. Well, they were giving you the facilities they have in their offices there for meetings?

A. Yes, sir.

Q. And they had representatives attend to advise you in those negotiations? A. Yes.

Q. Now, you related to a conversation you had with Mr. Latter on April the sixth. Will you just give us the whole of that conversation, if you will, what he said, and what you said, if you will? First, was there anyone else present besides just you and Mr. Latter?

A. There was no one else present.

Q. And where was this held?

(Testimony of Robert Peel.)

A. It was held in my office, very early in the business day, I would say about nine o'clock.

Q. Uh huh.

A. Mr. Latter came to me and said, "Now, these men you had have left."

Q. Where? A. At Salt Lake. [50]

Q. (By Mr. Callister): I see.

A. "Can't we get together and settle this thing up?" And I said, "Yes, I am perfectly willing to settle as the other houses have settled."

Q. Now, when had the other houses settled? And when I say "the other houses" I am now referring to John Scowcroft and Sons at Price, Ogden and Salt Lake, and the Utah Wholesale Grocery at Salt Lake.

A. Yes, the Utah Wholesale Grocery.

Q. Yes, when had they settled?

A. Well, they settled, I think, March the twenty-seventh.

* * * * * [51]

Q. (By Trial Examiner Doyle): How many men had you in the Salt Lake store that were possible displacements?

A. I think there were seven went out on strike. Three came back. One, in agreement with the Union, we understood would not be re-hired. So, there was three that never came back, and three that were on the picket line that did come back.

Q. (By Trial Examiner Doyle): Now, what I am getting at—your proposition, as I understand it, was the same for both Idaho Falls and Salt

(Testimony of Robert Peel.)

Lake City, you wouldn't discharge anybody to replace strikers?

A. No, sir; I hired them in good faith.

Q. (By Trial Examiner Doyle): All right. Now what I want to know is how many men were at Salt Lake that were subject to discharge, or that the Union wanted you to discharge and put their men back?

A. Well, originally there was three. Sometimes there was [55] four, and sometimes three. We hired, and re-hired.

Q. (By Trial Examiner Doyle): Well, in the course of those ten days those men that you had hired left your employ, did they?

A. Yes.

Q. (By Trial Examiner Doyle): So that you were able then to re-hire these strikers to the extent that they were all put back on the job, then, at Salt Lake?

A. We were ready to re-hire, or employ somebody else in case the Union didn't want them. And that was my conversation with Mr. Latter.

Trial Examiner Doyle: All right.

Q. (By Mr. Callister): Now, Mr. Peel, did Mr. Lott or Mr. Mattox advise you that if you would replace your men at Idaho Falls with those out on strike that they would execute the contract with you?

A. I don't remember any statement just as that was made.

Q. Well, but the only reason the contract wasn't

(Testimony of Robert Peel.)

executed, then, was because you had not—would not replace them? A. Yes, that's right.

Q. So, my point being that they did evidence, during the conversation, that they would sign the contract if you would replace your present men?

A. That I took to be the case.

Q. Yes. Now, you refer to the Mayor of Idaho Falls, Mr. [56] Sutton, had called you.

A. Yes.

Q. (By Mr. Callister): Now, this was after the strike had been in progress for how long, do you recall?

A. Well, I would say a couple of weeks, maybe three. Let me see. It started the fourteenth or fifteenth. I would say that was about the twenty-fifth or -sixth of March.

Q. Of April?

A. No, it was—it was toward the latter part of March, I think it was.

Q. Well, that would be right. A. Uh huh.

Q. Well, I see. Now, did you—now, was that after you had settled your contract with the Union for the Salt Lake plant?

A. No, I don't think so.

Q. It was before? A. It was before.

* * * * * [57]

Q. And then you came to Idaho Falls, as you have related, at [58] a subsequent time, is that correct?

A. Just three or four days after we settled at Salt Lake, I was up here. * * * * *

(Testimony of Robert Peel.)

Q. Now, on this meeting of Monday, that you have referred to, did you have a conversation with Mr. Lott at that time with regard to the contract, if you recall?

A. I addressed my remarks to the meeting, Mr. Lott was there, and then I had a conversation with Mr. Lott afterwards.

Q. Yes. And what did Mr. Lott say to you?

A. I asked Mr. Lott what he was going to do now, and if they were going to continue to annoy us, and he said, "You haven't seen anything yet."

Q. Now, since that time did you ever have a communication from Mr. Lott, or anyone else from the Union?

A. Not that I have any recollection of. [59]

Q. (By Mr. Callister): And then, after that meeting, is when you came to Idaho Falls to see the Union and the Mayor? A. Yes, sir.

Q. (By Trial Examiner Doyle): Did you leave word at the Union office in any way that you were here?

A. No; I went over there, and they were all torn up; there was carpenters, and plasterers, and everybody else in there; and the women—there was two women, and they weren't even anxious to talk to me, they said, "No," and walked to the back of the room, and that was all.

Q. (By Trial Examiner Doyle): There was mention of the Mayor. Did you notify the Mayor that you were up here?

A. I went over to see him. But, you see he had

(Testimony of Robert Peel.)

lost out in his election, and he wasn't any further interested in the thing.

Q. (By Trial Examiner Doyle): Did you see anybody of the Union, or leave word that you were up here? A. No, I didn't. * * * * * [60]

Redirect Examination

Q. (By Mr. Roll): Now, you testified, Mr. Peel, that sometime in January you made this six-cent offer to the Union, is that right?

A. I didn't—did I say it was in January?

Q. I understood you did, in response to a question by counsel.

Mr. Callister: He corrected me by saying later on, I think—I don't know. Go ahead.

A. It was in January, as I understood it, that the Government permitted us to do it, but we did it—I don't know when we did it in the course of those negotiations.

Q. (By Mr. Roll): About what time, then, in respect to the strike, would you say, how long before the strike did you make the six-cent offer?

A. I would have to guess at that. It was during those numerous meetings at Salt Lake, but which one, when it came up, [63] I wouldn't know.

Q. (By Mr. Roll): It is stipulated that the request for reopening was made January first, that the contract expired March first, and we know that the strike was settled March twenty-seventh as to the other operators, and April ninth as to your operation—— A. Yes.

(Testimony of Robert Peel.)

Q. —in Salt Lake. Now, could you, with respect to any of those dates, fix the time that you made such a proposal? A. No, I could not.

Q. Can you testify that Mr. Lott was present when that proposal was made?

A. No, I couldn't.

Q. You know that Mr. Lott did not participate in the Salt Lake negotiations until March twenty-seventh, don't you? A. No, I don't.

Q. Yet, you say you attended all of the meetings except one? A. Yes, but I don't know that.

Q. Now, I also understood you to testify that you told Mr. Latter, at the time he conferred with you in your office just prior to the Salt Lake settlement, that you were willing to settle the strike on the same basis as all of the others, is that right?

A. Except that I would not discharge the men we had hired.

Q. Now, there is one thing that I would like to clear up. [64] I believe the Examiner clarified it to some extent. Maybe I can go further. At first it was your testimony that the Salt Lake—the signing of the Salt Lake contract and the Salt Lake strike was prolonged because the—you refused to reinstate the Idaho Falls strikers. Isn't it a fact that Salt Lake—your employees at Salt Lake were on strike at the time the other operations settled on March twenty-seventh, and that you would not replace the strikebreakers, and that's the reason that you did not enter the agreement at that time?

A. The Union, as I tried to explain to you,

(Testimony of Robert Peel.)

insisted that we discharge these men, which we refused to do.

Q. (By Mr. Roll): That's right. Now, you are referring now to Salt Lake, as well as Idaho Falls, are you?

A. Yes, sir.

* * * * * [65]

Q. (By Trial Examiner Doyle): As I understand it, when you got to talking terms of settlement of the strike, the Union asked you to take back the strikers to jobs at both Idaho Falls and at Salt Lake City, is that right?

A. That's right.

Q. (By Trial Examiner Doyle): And you refused to do either, to bring them back at Idaho Falls, or at Salt Lake City?

A. No, that's not true. We had refused prior to that time to bring them back at Salt Lake, but at the time the last statement was made there wasn't anybody.

Q. (By Trial Examiner Doyle): All right. What I am getting to is, at the time everybody else started there was a question of replacing people at both Idaho and at Salt Lake City?

A. Yes.

Q. (By Trial Examiner Doyle): Right?

A. Yes, sir.

Q. (By Trial Examiner Doyle): Then the problem was solved as to Salt Lake City?

A. Yes.

Q. (By Trial Examiner Doyle): By some of these men leaving your employ? [67]

A. Mr. Latter got them other jobs.

(Testimony of Robert Peel.)

Q. (By Trial Examiner Doyle): All right. And then you could hire back these people—right?

A. Yes.

Q. And that solution was reached, as you say, about Saturday, is that right?

A. That was Friday.

Q. That was Friday? A. Yes.

Q. And then, the only remaining question, as a practical matter then, was Idaho Falls—

A. Yes, sir.

Q. —taking them back? A. Yes, sir.

Q. And it continued that way until Monday?

A. Yes, sir.

Q. And then, what was the solution on Monday?

A. Well, the Federal Mediator (sic) called a meeting on Monday. I don't know where he got into the deal—I didn't call him—and said that they would—we would have to settle at Salt Lake, regardless of whether the people at Idaho Falls got all they wanted, or not. That was his words. We were perfectly willing to settle, we wanted to get it settled.

Q. So, then you settled the Salt Lake?

A. Yes.

* * * * * [68]

Trial Examiner Doyle: Mr. Peel recalled.

ROBERT PEEL

a witness recalled by and on behalf of the General Counsel, was further examined and testified as follows:

Direct Examination

Q. (By Mr. Roll): The wage increase that we have discussed earlier as having been put into effect on or about March fifteen, Nineteen fifty-one, was that paid to any of the employees who went on strike? A. I don't think so.

Q. Was it paid — strike that, please. Do you know how soon replacements were hired after the strike began?

A. Yes, I can give you that information. (Examining documents.) You want it in detail?

Q. Oh, just when was the first replacement hired? [72]

A. One was hired on March the seventeenth, one——

Q. (By Mr. Roll): Well, that's sufficient. Was that individual given the six-cent increase at the outset?

A. I think all of these people were. All of the replacements, I think, were given that.

Q. In the subpoena which you received it called for a paper indicating the dates of hire and replacement of the people who had replaced the strikers. Do you have that with you?

A. That's what I am——

Q. That's fine. If I may see it? A. Yes.

(Witness produced a document to Mr. Roll.)

(Testimony of Robert Peel.)

Q. Did you put the six-cent increase into effect at any other of your operations at the same time that you put it into effect at Idaho Falls?

A. No, sir.

Mr. Roll: That's all.

Cross Examination

Q. (By Mr. Callister): Now, Mr. Peel, I assume that the increase was put into effect, we may say, as you employed replacements?

A. Yes, sir.

Q. There was no fixed day it was put into effect, was there? A. No.

Q. In other words, when the new—when the replacements were [73] hired the amount of six cents was added to the then hourly pay rate, is that right? A. Yes.

Q. (By Mr. Callister): Did you authorize that to be done? A. No, I didn't.

Q. How did it come about, do you know?

A. Yes, I know how it came about. Scowcrofts announced an increase of six cents an hour, and—

Q. Now, Scowcrofts—Scowcrofts is operating here in Idaho Falls?

A. Right next door to them.

Q. I see.

A. In the wholesale grocery business.

Q. I see.

A. They announced that increase as of March the fifteenth, and Mr. Walker met it, and we knew nothing about it in the office at Salt Lake until the

(Testimony of Robert Peel.)

pay checks were sent, or the payroll was sent there for make-up on the thirty-first of March.

Mr. Callister: That's all. Thank you.

Q. (By Trial Examiner Doyle): Walker was your local manager here—— A. Yes.

Q. ——is that right?

A. Yes, sir. [74]

* * * * *

Redirect Examination

Q. (By Mr. Roll): You said you did not give the increase at Salt Lake, didn't you?

A. Not at that time. It was included in the wage settlement that was made later.

Q. When you said that Scowcroft gave the increase and announced it, I believe, as of March fifteenth—was that your testimony?

A. Yes, sir.

Q. Are you positive that that is the date that they gave the increase to their employees?

A. At Idaho Falls?

Q. Yes.

A. I have a copy of their circular here, if you would like to read it.

Q. I would, if you don't mind.

(Witness produced a document to Mr. Roll.)

Q. Was your pay-roll made up in Salt Lake, Mr. Peel? A. Yes, sir.

Q. Who granted the increase to the Idaho Falls employees? Did Mr. Walker do that, or did you?

A. Mr. Walker.

Q. Did he do it prior to consulting you? [75]

(Testimony of Robert Peel.)

A. Yes, he re-hired them on that basis, and I never knew of it.

Q. (By Mr. Roll): You didn't know that the increase had been given, then, at the time Mr. Walker hired the new people?

A. That's right.

* * * * *

REED THUESON RITCHIE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Roll): Will you state your name and address for the record, please? [76]

A. Reed Thueson Ritchie, Ashton, Idaho.

Q. (By Mr. Roll): What is your occupation, Mr. Ritchie?

A. Farming at the present time.

Q. Have you ever been an employee of Symns Grocer Co.? A. You bet.

Q. When did you begin work there, do you remember?

A. October the first, nineteen fifty.

Q. Who hired you, Mr. Ritchie?

A. Emmett Walker.

Q. Did you consult or interview anyone else in the company's employ before going to work?

A. No, I didn't.

Q. Was there a union among the company's employees at the time you went to work?

(Testimony of Reed Thueson Ritchie.)

A. No.

Q. When did you first—strike that. That is, to your knowledge there was not?

A. Would you ask that question again, please?

Q. I say, did you—were you in a position to know whether there was any union activity among the employees at the time you went to work?

A. Not the day that I talked to Mr. Walker about going to work.

Q. I see. How long after—strike that. Did you discuss unionization after you went to work? [77]

A. With the crew members.

Q. (By Mr. Roll): I see. Did you have a discussion with Mr. Walker concerning the Union?

A. No, I didn't, not in the early months.

Q. Did you at a later time?

A. Yes.

Q. What was—about what date was your first discussion with Mr. Walker, concerning the Union?

A. About January the tenth.

Q. About January tenth?

A. Nineteen fifty-one.

Q. Do you recall that discussion?

A. Vividly. It was—

Q. Just a minute, before you go into it. Do you recall that in some detail? A. Yes.

Q. Where did it take place?

A. Out in front of the Symns warehouse.

Q. Was there anybody else present?

A. No.

Q. Now, relate the conversation as nearly as you

(Testimony of Reed Thueson Ritchie.)

can recall, what Mr. Walker said to you, and your replies, if any.

A. It was in the afternoon, and I was going out on the truck to take a load of deliveries, and Mr. Walker came down and talked to me, and we had been informed that the Government had [78] advised a raise, and——

Q. (By Mr. Roll): Now, how—who informed you of that? A. By the papers.

Q. Oh, I see. All right.

A. And he stated that we were going to get a raise, and that there was no need of joining up with the Union, that it wasn't any good, and wouldn't do me any good, and for me to stay clear of the Union, that I would only be wasting my money in paying into a Union. And that's about as near as I recall it.

Q. All right. Did you have any further discussion with Mr. Walker at a later time concerning the Union? A. Yes, I did.

Q. Can you tell me about when that occurred?

A. About March the twelfth, Fifty-one.

Q. Bearing in mind that a strike was called, and the workmen struck on March fifteenth, is that the approximate date, as you remember?

A. That's right.

Q. Where did this discussion take place, Reed?

A. This was in the warehouse, Symms warehouse.

Q. Were there any others present?

A. Yes, about three members, as I recall.

(Testimony of Reed Thueson Ritchie.)

Q. Would you name them, please?

A. Lyle Carson, Harry Graves, and I believe Don Forbush, and myself. [79]

Q. (By Mr. Roll): I believe you said "Harry Graves." Could that be Charles Graves?

A. Yes.

Q. Do you remember the approximate time of day?

A. I would say the afternoon, but I don't recall exactly.

Q. Would you relate your discussion at that time, or what Mr. Walker said, and what the men said, as near as you can recall?

A. We were there in the warehouse, and there had been a lot of discussion as to why our pay increase hadn't come through, and he came out while we were talking about it, and so we were talking to one another why we weren't receiving the raise in pay, and he stated that we were getting one.

Q. Now, when you refer to "he," do you mean——

A. Emmett Walker.

Q. All right.

A. That the Government had approved a six-cent per hour increase in pay, and that it would be on our next checks. And the next check was due about March the fifteenth.

Q. Was there any further discussion at that time, that you recall?

A. Not offhand.

Q. When did you next talk to Mr. Walker with respect to your wages or the Union? Strike that. I will ask another question. Did you go on strike?

(Testimony of Reed Thueson Ritchie.)

A. Yes, I did.

Q. (By Mr. Roll): Do you remember the date? Was it March fifteenth?

A. March fifteenth.

Q. Fixing that as the next date, when did you next discuss the Union or wages with Mr. Walker?

A. I would say March—Excuse me—April the first, Nineteen fifty-one.

Q. Did you receive your pay check on March fifteenth? A. No, I didn't.

Q. Did you have any discussion with Mr. Walker concerning your pay check?

A. Yes. On March the sixteenth, the day after the strike, we went into the office to get our—

Q. Now, just a minute, Reed. Who all went into the office? A. Lyle Carson—

Q. All right.

A. —myself, and I believe Charley Graves, and we were told that our checks were sent back to Salt Lake, so that the day that we hadn't worked would be taken off, and also the increase.

Q. Now, who—

Mr. Callister: Mr. Reporter—just a minute—would you read to me that answer, please?

(Answer read.) [81]

Q. (By Mr. Roll): Who told you that, Reed?

A. Emmett Walker.

Q. Was that the company's manager?

A. That was the present manager.

Q. Was anything further said concerning the increase, that you can remember?

(Testimony of Reed Thueson Ritchie.)

A. No, I don't recall.

Q. Do you know whether the increase was on your check?

A. No, I never seen the checks, but I took his word for it, took Emmett Walker's word for it.

Q. Did Mr. Walker tell you that?

A. He told us that it was.

Q. That the checks to be delivered on March fifteenth did contain a wage increase?

A. You bet.

Q. Did you get your checks that day?

A. No, I didn't.

Q. When did you get your checks?

A. About March the seventeenth, or soon after, his grandson delivered Lyle Carson's check and myself, our checks, out on the picket line.

Q. Did you have any further discussion with Mr. Walker?

A. Yes, I did.

Q. Can you fix the approximate date?

A. About April the fourth, Fifty-one. [82]

Q. (By Mr. Roll): Where did that discussion take place?

A. On the picket line in front of Symns Grocer Company.

Q. Was there anybody else present?

A. No.

Q. Were you picketing by yourself?

A. I was standing in this spot, and Lyle Carson was up the line.

Q. About what time of day did this occur?

(Testimony of Reed Thueson Ritchie.)

A. Yes, I did.

Q. (By Mr. Roll): Do you remember the date? Was it March fifteenth?

A. March fifteenth.

Q. Fixing that as the next date, when did you next discuss the Union or wages with Mr. Walker?

A. I would say March—Excuse me—April the first, Nineteen fifty-one.

Q. Did you receive your pay check on March fifteenth? A. No, I didn't.

Q. Did you have any discussion with Mr. Walker concerning your pay check?

A. Yes. On March the sixteenth, the day after the strike, we went into the office to get our——

Q. Now, just a minute, Reed. Who all went into the office? A. Lyle Carson——

Q. All right.

A. ——myself, and I believe Charley Graves, and we were told that our checks were sent back to Salt Lake, so that the day that we hadn't worked would be taken off, and also the increase.

Q. Now, who——

Mr. Callister: Mr. Reporter—just a minute—would you read to me that answer, please?

(Answer read.) [81]

Q. (By Mr. Roll): Who told you that, Reed?

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A. That was the present manager.

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(Testimony of Reed Thueson Ritchie.)

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A. No.

Q. Were you picketing by yourself?

A. I was standing in this spot, and Lyle Carson was up the line.

Q. About what time of day did this occur?

(Testimony of Reed Thueson Ritchie.)

A. Around noon, as Mr. Walker was going home for dinner.

Q. State what occurred.

A. He stopped there on the pavement, and said, "What are you doing here?" I said, "I am picketing." He says, "What for?" and I said, "For the Union, because we feel that we need an increase in pay, and we were told that we would get an increase." He says, "Well, you are fired; you can't come back in here and work." And he says, "If I were you," he says, "I would get out of here, because," he says, "the Union is no good, and you are only paying money into it." And so he says, "I would slip off of this picket-line right now." And that was—and he drove off.

Q. Did you give any further explanation concerning the reason for your picket-line?

A. Yes, I could.

Q. No, I say, did you to Mr. Walker?—at that time.

A. No, other than a raise in pay and our overtime pay, which [83] I had not received.

Q. (By Mr. Roll): What was your job with the company, Reed?

A. It was driving truck, delivering in the city of Idaho Falls, and also working in the warehouse.

Q. Do you know Lyle Carson? A. Yes.

Q. From whom in the company's employ—Strike that. When you were hired did Mr. Walker tell you who would give you the orders, that is, who would be your boss?

(Testimony of Reed Thueson Ritchie.)

A. He said that he's the boss, he's the manager, he said.

Q. When you refer to "he" being the boss——

A. Emmett Walker.

Q. Emmett Walker is the boss?

A. Yes.

Q. Was Lyle Carson your boss?

A. He was foreman by name, but not by pay, and if Emmett Walker asked him to do something he would come out and ask us if we would do it, but he never forced us. Mr. Walker gave the orders, as I——

Q. If Carson had given you an order that you didn't want to obey, what would you do?

A. I would refuse, unless I wanted to be polite, and as a neighbor.

Q. Do you know whether Carson had the authority to discipline you? [84]

A. No, I don't. I was never told that.

* * * * *

Q. (By Mr. Roll): Did you interview Carson prior to the time you went to work?

A. No, I didn't. [85]

* * * * *

Cross Examination

Q. (By Mr. Callister): Mr. Ritchie, who told you that Mr. Carson was foreman?

A. Mr. Walker, after I had worked there some days.

Q. Uh huh. And he told you Mr. Carson was the foreman, is that right? A. That's right.

(Testimony of Reed Thueson Ritchie.)

Q. Now, was Mr. Walker always at the warehouse? A. No, he wasn't.

Q. There were many occasions, were there not, when he was absent from the place of business?

A. Yes.

Q. And isn't it true that when Mr. Walker wanted something done he would tell Mr. Carson, who would come out and tell you gentlemen? [86]

A. Not always.

Q. (By Mr. Callister): Well, he did on occasions, didn't he?

A. Yes, there were a few occasions.

Q. Now, there were only five of you working there, wasn't there? A. Yes.

Q. Or six?

A. You mean——

Q. Prior to the strike, how many men—how many were there in the warehouse, the drivers and the warehouse?

A. Well, I would have to—Drivers?

Q. And warehouse.

A. And the warehouse? And counting the office staff?

Q. No, no, no, just the warehouse and drivers.

A. There was five of us.

Q. That's right. That's including Mr. Carson?

A. Yes.

Q. And did anybody else, other than Mr. Carson every tell you what to do, of those five people?

A. Yes.

Q. Who?

(Testimony of Reed Thueson Ritchie.)

A. Some of the other boys that had been there longer than I had.

Q. Well, they would tell you how to do it, wouldn't they? A. Well—— [87]

Q. (By Mr. Callister): That's what it was, wasn't it?

(Witness nods his head in the affirmative.)

Q. You are shaking your head "yes?"

(No answer.)

Q. I notice you shaking your head up and down.

Trial Examiner Doyle: You will have to answer. You see, the stenographer is watching his book, and he can't see your head.

A. I'll put it No.

* * * * *

Q. I see. And, isn't it true, Mr. Ritchie, that Mr. Carson would tell other boys, other than yourself when to do something? Haven't you heard him do that on occasions? A. Yes.

Q. Now, when you said that Mr. Carson was foreman in name and not in pay, what did you mean by that?

A. He told me, and I seen his checks, he was receiving the same amount as I was.

Q. He wasn't getting an amount in excess of you, then? [88] A. That's right.

Q. (By Mr. Callister): How much were you getting, Mr. Ritchie?

A. A dollar seventeen, per hour.

Q. I see. And he was only——

A. And no overtime.

(Testimony of Reed Thueson Ritchie.)

Q. And he was only getting a dollar seventeen, is that right? A. That's right.

Q. Are you sure of that, Mr. Ritchie?

A. I seen his checks.

Mr. Callister: I see. That's all.

Redirect Examination

Q. (By Mr. Roll): Did the checks that you received from the company show the hourly rate of pay that a man received, do you remember?

A. Yes, I believe they did.

Q. Are you so positive on the hourly rate that was received by Lyle Carson that you would say you could not be in error?

A. I would say no, because my memory now I believe there was a difference.

Q. Do you know—would you be able to recall approximately how much it was?

A. No, I wouldn't. I believe there was a little difference, his was a little higher, but I couldn't state. [89] * * * * *

Q. When Mr. Walker told you a few days after you began work that Lyle was the foreman, did he tell you what authority Lyle had, Lyle Carson, I mean?

A. No, he didn't, he merely stated that Lyle was foreman of the warehouse.

Q. Are the statements that you have made concerning his authority been based upon your observation of the orders that he gave, or the direction that he gave to the men?

(Testimony of Reed Thueson Ritchie.)

A. Yes, I would say they were.

Mr. Roll: That's all.

Recross Examination

Q. (By Mr. Callister): Mr. Carson was a union man with you, wasn't he? A. Yes.

Q. He went out on strike with you?

A. Yes.

Q. Was he the shop steward?

A. The only title I heard was foreman.

Mr. Callister: That's all. Thank you. [90]

Redirect Examination

Q. (By Mr. Roll): Did Lyle Carson perform manual labor, the same as the rest of you?

A. Yes, he worked right along with us in the warehouse. He also had the books to keep in his office.

Q. Did you notice any privileges exercised by Carson that were not exercised by the remainder of the warehouse personnel?

A. Not while I worked there.

Mr. Roll: That's all.

Recross Examination

Q. (By Mr. Callister): You say he had books to keep. What do you mean by that? Can you explain?

A. He had to keep a record of the bills of groceries that went out, and also those that were brought into the warehouse.

(Testimony of Reed Thueson Ritchie.)

Q. Anything else? Did he have an office, you say?

A. There was a little office room on the end of the main office.

Q. And that was his office?

A. Yes.

Mr. Callister: That's all.

Redirect Examination

Q. (By Mr. Roll): The office that you refer to, Reed, is that the place where orders were stacked to be filled?

A. Well, orders were given to Lyle there, and then he would put them out on the table just outside his window. [91]

Q. (By Mr. Roll): That's order blanks that were filled from the warehouse?

A. Yes, to be filled. [92]

* * * * *

CLARENCE P. LOTT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Trial Examiner Doyle): Will you please state your full name, and residence?

A. Clarence P. Lott, two ten East Chapel Street, Pocatello, Idaho.

Q. Is that spelled L-o-t-t?

A. That's correct. [104]

(Testimony of Clarence P. Lott.)

Q. (By Mr. Roll): What is your occupation, Mr. Lott?

A. I am Secretary and Treasurer of the Teamsters, Chauffeurs, Warehousemen and Helpers Local number nine eight three, of Pocatello, Idaho.

Q. Is your Local affiliated with a joint council of Teamsters? A. It is.

Q. Will you state what Council?

A. Joint Council sixty-seven, of Salt Lake.

Q. Can you state whether your organization admitted as members any of the employees of Symns Grocer Co.? And when I say "members" I mean signed authorization cards of members, actual membership? A. They did.

Q. Can you state the approximate date?

A. About August the sixth.

Q. August of Nineteen fifty?

A. Nineteen fifty.

Q. We have already stipuated in the record that certain letters were exchanged between the Local and the company, and also a contract proposal was—contract proposals were exchanged. Did you contact any company official with respect to collective bargaining? A. I did.

Q. Who was the first official that you contacted?

A. Mr. Peel, of Salt Lake City.

Q. (By Mr. Roll): Is that the Mr. Peel that testified here this morning? A. It is.

Q. Can you state the approximate date?

A. Approximately, it was about October twentieth, during the period I was in Salt Lake for a

(Testimony of Clarence P. Lott.)

period of three or four days at that time. That was not a personal contact. It was by phone.

Q. Then, your initial organization was sometime in August, elections were in September, and you contacted the company in latter October. Was there any reason for your delay in contacting Mr. Peel?

A. We were not certified as to the Union Shop election until September twenty-fifth, was the final certification, and that was the first time that I went into Salt Lake between that period and September twenty-fifth and October, and I had been informed by Mr. Mattox that Mr. Walker did not have any authority to negotiate an agreement.

Q. How did you contact Mr. Peel?

A. By telephone.

Q. Will you relate the substance of that telephone conversation? Just a moment, please.

Mr. Roll: Counsel, will there be a dispute as to this conversation, must I identify how he knew it was Mr. Peel, [106] and so on?

Mr. Callister: Oh, no.

Q. (By Mr. Roll): What was the substance of your conversation?

A. I informed Mr. Peel, as he knew, that we had been certified by the National Labor Relations Board as bargaining agent, and introduced myself as the Secretary and Treasurer of Local nine eighty-three, and suggested that we arrange a meeting. And Mr. Peel said that he would like uniformity in agreements through Utah and Idaho, and in the conversation I told him we had no ob-

(Testimony of Clarence P. Lott.)

jection as a general thing to uniformity, but because of the Atomic Energy being situated in Idaho Falls area that the wage picture was fast changing, and I felt that there should be a differential in wage scales in the Idaho Falls area. I also pointed out to Mr. Peel that the vacations, we had been successful in getting a little more liberal vacation clauses than what was in the Salt Lake agreement, and that there was no union security. Mr. Peel suggested that we prepare a proposal, and send to him in the form of a proposal, as that was the usual procedure, and I told him that that would be done.

Q. And the proposal that is now in evidence as General Counsel's Exhibit Two is the result of your agreement with Mr. Peel, is that right?

A. That's correct. [107]

Q. (By Mr. Roll): Was there any discussion concerning the actual terms of a contract in your telephone conversation at this time?

A. Only in the general picture that Mr. Peel said that he would like to have his contracts uniform in verbiage and wordage, as to the contracts under which he operated.

Q. When did you next contact a company official, Mr. Lott?

A. About, I think, January sixth.

Q. Of Nineteen fifty-one?

A. Nineteen fifty-one.

Q. Who did you contact that time?

A. Again I contacted Mr. Peel by phone.

Q. By telephone? A. Yes.

(Testimony of Clarence P. Lott.)

Q. Will you relate the substance of that conversation?

A. I informed Mr. Peel that he had met with Mr. Mattox, our business agent, and there had been no satisfaction as to reaching an agreement, and——

Q. May I interrupt. Do you happen to know the date of that meeting that you referred to, between him and Mr. Mattox?

A. This meeting that—Mr. Mattox met with Mr. Peel on November twenty-fourth.

Q. I see. All right.

A. And that——

Mr. Callister: May I interrupt, Mr. Roll? [108]

Mr. Roll: Yes.

Q. (By Mr. Callister): May I ask where this telephone conversation was had, Mr. Lott? Was it in Salt Lake, or——

A. Yes, in Salt Lake.

Q. And also your first conversation?

A. They were both in Salt Lake.

Q. (By Mr. Roll): Was your first telephone conversation in Salt Lake? A. Yes.

Q. All right.

A. We were concerned with the wage freeze, because of the publications being put out that there was a wage freeze in the process, and asked Mr. Peel if he would consider any increases in the Idaho Falls operation, that it had been our policy not only on contacting companies we were negotiating with but those that had contracts in effect to see if they would not voluntarily give an increase at that time, because we felt sure that a wage freeze

(Testimony of Clarence P. Lott.)

was in the making. And he informed me at that time that he would be negotiating with Salt Lake, and that he was not interested in whether or not there would be a wage freeze, nor was he interested in negotiating with the Idaho Falls district until he got the negotiations out of the way in Salt Lake City.

Q. In this telephone conversation did you propose a specific wage increase? Did you mention any set figure? [109]

A. No, I never mentioned any set figure. I think in the discussion that arose there over the telephone that I did mention that several of the companies in our area had given a ten-cent voluntary increase, but no specific amount was proposed to the company as to what they—as to whether they increase, or not.

Q. (By Mr. Roll): Did you seek a meeting with Mr. Peel—— A. Yes.

Q. ——at this conversation? A. Yes.

Q. What was his reply?

A. He replied that he would not come to Idaho Falls to meet with us until such time as he had the Idaho Falls—or, the Salt Lake negotiations out of the road.

Q. When was the next occasion that you had to talk with a company official?

A. March first.

Q. Where were you at that time?

A. I was in Salt Lake.

Q. What company official did you talk with at that time? A. Mr. Peel.

(Testimony of Clarence P. Lott.)

Q. Was this in person, or by telephone?

A. No, by telephone.

Q. By telephone?

A. Yes. At that time I talked to Mr. Bailey and Mr. Latter [110] in regards to the negotiations, and I asked Mr. Bailey how they were coming with the negotiations in the Salt Lake area, as it pertained to the grocery warehouses in the Utah district, and they told me that they had made no progress, whatsoever, at that time, and it looked like that——

Mr. Callister: Well, just a minute. We move to strike, and object to further testimony of his conversation with Mr. Bailey; it is purely and simply hearsay.

Q. (By Mr. Roll): Well, is this what you told Mr. Peel? The conversation that you are relating now did you tell Mr. Peel this?

A. I told Mr. Peel—If you want the conversation.

Q. That's what I want.

A. I called Mr. Peel and asked him if we couldn't get together on a contract, and he again told me that he had—that he could not meet with me until he got the Salt Lake negotiations out of the road; that he was in the process of having a meeting with the Salt Lake grocer warehouses in connection with the contract, and that until those negotiations were cleared up that he would not meet with me. Well, first, I might say this, that I identified myself, and asked Mr. Peel if he was

(Testimony of Clarence P. Lott.)

free at one-thirty, and he said, "Yes," and I asked him to have a meeting, and he said he would be glad to have a meeting, and then he asked what the purpose of the meeting was, and I told him I would like to discuss the contract in the Idaho Falls area, and he said that would be useless, he said [111] "That would be a waste of time for us to meet and discuss the contract until such time as we get the Salt Lake negotiations out of the way." And I asked Mr. Peel then if he would give us the identical contract—if that was his position, if he would give us the same contract that Salt Lake had, and he said he didn't see any reason why he should make any commitment as to what he would give us. I told him I understood from Mr. Bailey and in talking with Mr. Latter that they had made a request for twenty cents an hour increase, and that they had made a request for a Union Shop. He said they would never get a Union Shop, and I said, "Suppose they get one, will you give it to us?" He said, "No, I wouldn't give—I am not making any commitments, whatsoever, as to the Idaho Falls operation." And I said, "Well, then, probably we better use our economic strength to force a contract, and do it in connection with and at the same time, as I understand that Salt Lake is anticipating a strike in their operations, and if that's the position of the company we probably better use our economic strength at the same time that Salt Lake uses their's." He said, "Go right ahead. You don't represent our employees, anyway. You haven't got a man

(Testimony of Clarence P. Lott.)

up there. Everyone of them tells us that they don't belong to the Union." I said, "Well, that isn't the certification, according to the Board. We are certified, and," I said, "you are not following the desires when you deny any discussion of the Union Shop, and the employees [112] voted one hundred per cent for a Union Shop." We argued about that, and he said they did not, and I asked him if he would grant us one if the certification so showed that, and he said no, he would not. And he said, "If you think that your boys will go on strike up in Idaho Falls, why, go right ahead. You don't represent the employees up there, anyway. There isn't any of them that belong to the Union." And so, I told him then that would probably be our procedure, we would contact the Idaho Falls boys and see whether they wanted to, and it would be up to them to decide, and the issue would probably be decided whether we represented them by a strike vote of the employees.

Q. (By Mr. Roll): Now, I want to make certain. Did you say that you requested a meeting with Mr. Peel on that date, March first? A. Yes.

Q. Do you know whether negotiations were in progress between the Symns Grocer Co. and the Salt Lake Union at that time?

A. Well, not for an absolute fact. All I know is from discussing it with Mr. Latter and Mr. Bailey that they had had meetings with the grocery warehouses.

Q. Had you participated in any such meetings

(Testimony of Clarence P. Lott.)

between the grocery companies and the Utah Union prior to March first? A. I did not.

Q. What was the—Did you attend any of the negotiations [113] meetings in Nineteen fifty-one?

A. I did not attend any of the negotiating meetings, no.

Q. (By Mr. Roll): Did you attend any meeting at which the grocery companies and the Salt Lake Union were present? A. Yes.

Q. What was the first meeting that you attended?

A. March twenty-seventh.

Q. Nineteen fifty-one? A. Uh huh.

Q. Going back to March first again, and your discussion with Mr. Peel, did the employees at Idaho Falls subsequently strike?

A. They did.

Q. Do you know the date that they struck?

A. On March fifteenth.

Q. When was your next contact with a company official of Symns Grocer?

A. March twenty-seventh.

Q. And was that the same date that you attended the meeting between the unions and the companies? A. That's right.

Q. Will you relate—Oh, by the way. Where was that meeting held, Mr. Lott?

A. At Salt Lake City.

Q. Whereabouts in Salt Lake? [114]

A. At the Industrial Labor Relations Council.

Q. (By Mr. Roll): About what time of day, do you recall?

(Testimony of Clarence P. Lott.)

A. I think it was ten o'clock in the morning, as I recall.

Q. Who was present at that conference? As many names as you can remember.

A. Well, there was quite a numerous—as I recall, quite a numerous amount of people; there was Mr. Peel, Mr. Callister, Mr. Thoreson, Mr. Hampton, Lyle Johnson, the Conciliator, myself, Mr. Bailey, Mr. Latter, and a Mr. Smith, and a Mr. Scoweroft, and then there was three or four, I think it was four—I wouldn't want to say the number—of employees from the different grocery warehouses that was on strike at that time.

Q. Mr. Scoweroft to whom you refer, is that the—was he an employer representative representing that particular company?

A. That's correct.

Q. What Mr. Smith did you refer to?

A. Well, I couldn't tell you his initials. Mr. Smith was representing the Utah Wholesale.

Mr. Callister: His name is A. B. Smith.

Mr. Roll: A. B. Smith?

Mr. Callister: Yes.

Q. (By Mr. Roll): Now, will you relate what happened in that meeting as it pertained to you?

A. Mr. Johnson, the Conciliator, whether it was a matter of procedure I do not know, or whether there were so many faces [115] that he wanted to clear the record, asked the group that was sitting at the table if they would identify themselves and who they represented, for clarification of his records; and it was started at the head of the table,

(Testimony of Clarence P. Lott.)

and when I identified myself as of Local nine eighty-three, of Pocatello and Idaho Falls area, Mr. Callister immediately objected to me sitting in the meeting; that I was not a part of the bargaining unit; that historically it bore out that the grocery warehouse had negotiated in the Salt Lake area for the Salt Lake area as a group, and we were separate and apart as a bargaining unit. And there was quite a considerable argument, and some of the other employers objected from Salt Lake that was sitting there, and I told them that our employees had gone on strike because we were unable to secure a contract, and for that reason we had asked Local nine eighty-three (sic) to notify us of any meeting of the Conciliation Service that the Service called, as we understood or knew that they would be in the picture, and that we would like to sit in with them in an effort to settle the Idaho Falls strike at the same time.

As I say, when Mr. Callister raised the issue on the fact that we were separate and had a separate election, the history of the bargaining unit had not been—that we had not bargained in a group, that the Idaho Falls had never been included, the Conciliator said he would have to go along with the employers' objection, but asked if there was any objection [116] to me sitting into the meeting as a spectator, and they said no, they had no objection as long as I had no voice in the negotiations.

Q. (By Mr. Roll): I think you said that some

(Testimony of Clarence P. Lott.)

employer representatives commented. Do you recall any employer representative in particular?

A. I think Mr. Peel raised the objection, and Mr. Smith were the two most emphatically. There was quite a heated argument—discussion for just a few minutes as to my presence, that I was an outsider, and I had no business there, and also the Conciliator said they would have to go on because there was a different Regional Board, and as far as he was concerned he had had no notification of Idaho Falls being in the dispute, and that he could not allow me to sit into it, as we were under a different Board, and unless the conciliation board had turned over the authority for conciliation that I would not be allowed to participate.

Q. Clarence, I wish you would exhaust your recollection now on the statement that you made before that group, as to the reason why you were there, and why you were seeking to participate or seeking to sit in.

A. Well, our employees had gone out on strike to force a contract with the Symns Wholesale, and in connection with it we felt that the——

Mr. Callister: Well, just state what you said, Mr. Lott, not what you felt. In other words, we want just your conversation. [117]

A. I made the statement that our employees were out on strike to force a contract with the Symns Wholesale Grocery, and it was advantageous for us to go out on strike at the same time as Salt Lake, and that we were there for the same purpose as

(Testimony of Clarence P. Lott.)

Salt Lake, to try to settle that—the strike, as Salt Lake was out on strike, we were there to settle the strike in the same manner and under the same conditions as Salt Lake settled it.

Q. (By Mr. Roll): Did you set forth in your discussion at that meeting any of the reasons why you were on strike?

A. Only the fact that we were out on strike to force a contract with Symns, that they had failed to bargain with us, had failed to meet with us, they had never been in the Idaho Falls area, had never once in the period of the time from certification we had never had an employer representative meet with us in the Idaho Falls area to discuss a contract.

Q. Did you make that statement before the group? A. Yes.

Q. Thereafter did you—were you permitted to sit in the meeting? A. Yes.

Q. Did you have a voice in the meeting?

A. No. [118]

* * * * *

Q. You testified, did you, that Mr. Peel participated in the discussion? A. Yes.

Q. Was there anything further at that meeting that pertained to you, or your Local?

A. Only, as I recall, I think Mr. Johnson—the employers after were separated and went into one room, the Conciliator going back and forth, and he came in and reported that the agreement could be reached between the Utah Wholesale and Scow-crofts, that they had agreed to grant the—as I re-

(Testimony of Clarence P. Lott.)

call, I think it was a thirteen-cent an hour increase, with six cents going in, and seven cents to go before the Board, and to reinstate all the boys that was out on strike, but that Symns had refused that settlement.

Q. Did that agreement involve any form of union security, do you know?

A. There was a modified union security, that is, a modification [122] over what had previously been in the contract; different verbiage, entirely.

Q. (By Mr. Roll): What you would normally refer to as a modified Union Shop? A. Yes.

Mr. Callister: Well, just a minute. If the Examiner please, we move to strike his conclusion. Let's have what it is, rather than let him determine whether it was a modified Union Shop, or not.

Q. (By Mr. Roll): Do you know what the agreement provided in the form of union security?

A. No, I couldn't quote it as a—from the record.

Mr. Callister: I will state what it is.

Q. (By Mr. Roll): Can you state in essence——

Trial Examiner Doyle: The substance of it.

Mr. Roll: If Mr. Callister will.

Mr. Callister: As I understand, it's a maintenance of membership all employees now members must remain members for the duration of the contract.

Trial Examiner Doyle: Is that it?

A. May I add to that, that wasn't there a stipulation that the employer would inform new employees coming to work of the conditions that a

(Testimony of Clarence P. Lott.)

union contract existed? I think it's a matter of record as to how the clause reads.

Q. (By Mr. Roll): Very well. That's sufficient. Was there [123] a discussion concerning whether Mr. Peel would accept that contract for the Idaho Falls Local, meaning your own Local nine eighty-three?

A. No, the Conciliator had informed us that we were not a part of that, that he could not deal for us.

Q. Very well.

A. That he had no authority, whatsoever.

Q. When did you next contact a—No. Strike that just a moment. I think earlier in your testimony you testified—you stated that you instructed Local nine eighty-three to give you notice of future meetings. Did you mean nine eighty-three, Mr. Lott?

A. No, our Local two twenty-two.

Q. That's your Salt Lake Local?

A. That's right.

Q. Your request, then, was that the Salt Lake Local notify nine eighty-three of any future meetings? A. Yes, that's correct.

Q. I think that clears it up. Now, when was the next time that you saw a representative of the company? A. April ninth.

Q. Where was that.

A. That was in the Industrial Labor Relations Council, I think it is called, in their offices at Salt Lake.

Q. At Salt Lake? [124] A. Yes.

(Testimony of Clarence P. Lott.)

Q. (By Mr. Roll): Who did you see there?

A. Mr. Peel.

Q. Can you state the names of those persons present?

A. Mr. Peel, and Mr. Thoreson, and Mr. Hampton, Mr. Mattox, myself, Mr. Bailey, and Mr. Latter, as far as I know.

Q. Who was Mr. Bailey?

A. He is a business representative for Local two twenty-two.

Q. And Mr. Mattox?

A. He is the business representative of nine eighty-three, stationed at Idaho Falls, or was at that time.

Q. Will you state the approximate time of day of this meeting?

A. If I recall, I think it was a morning meeting again.

Q. Mr. Symns was at that meeting, did you mention (sic)? A. Yes.

Q. Or, Mr. Peel, rather.

A. Yes. I think the meeting was called at ninety-three or ten o'clock. That's the usual time of their meetings.

Trial Examiner Doyle: Just a moment.

Mr. Roll: Yes.

Q. (By Trial Examiner Doyle): Who did you say Latter represented?

A. Mr. Latter is Secretary of the Local two twenty-two, but he is also Secretary of the Joint Council, holding that office, the two distinct offices.

(Testimony of Clarence P. Lott.)

Q. (By Mr. Roll): Will you relate what occurred at this meeting, as it pertained to you and Local nine eighty-three?

A. As I recall, the settlement was offered to Local two twenty-two that had previously been offered to the other grocery warehouses, it being brought out that there was no people employed now at the Symns Grocer warehouse, and that Mr. Symns—or, Mr. Peel agreed to take back any employees that was out—had been out on strike and reinstate them, and that—Well, in substance, it was the same agreement that was reached in the twenty-seventh—March twenty-seventh meeting, but it did not involve the discharge of any employees.

Q. All right. Was there anything further, Mr. Lott?

A. Well, when the statement—when it was—that offer was made, Mr. Latter asked Mr. Peel if that would cover the Idaho Falls operations, and he said, "Absolutely not." He said he would make a survey at Idaho Falls, and see what the conditions was in the next few days, and he would meet with us up there, but he would not settle on the same conditions as he was settling in Salt Lake.

Q. Now, who asked Mr. Peel that question?

A. Mr. Latter.

Q. Did you have a discussion with Mr. Peel at that time?

A. Afterward, I asked Mr. Peel if he would reinstate the employees, and he said that he would not if it meant discharging any employees in the

(Testimony of Clarence P. Lott.)

Idaho Falls operation; he was getting [126] along fine, the operation was running swell, and he had no discussions with us, and as far as we were concerned, why, he was getting along very nicely without us.

Q. (By Mr. Roll): Now, your discussion with Mr. Peel concerning the reinstatement of the employees, was that connected with any other condition, or was that an outright request for reinstatement?

A. I asked Mr. Peel down on the street why—would he reinstate those boys at Idaho Falls—we were walking out after we left the building—and he said, “Absolutely not.”

Q. At that meeting do you know whether Mr. Peel did agree to the same contract that was reached with the other employers on March twenty-seventh?

A. Yes, sir, he agreed.

Q. He agreed to accept that?

A. He agreed to the same contract that was reached on the twenty-seventh.

Q. Did Mr. Peel at that time offer to you the same contract? A. He did not.

Q. Did you hear his testimony this morning—

A. Yes.

Q. —that he did make such an offer?

A. Yes.

Q. Did you have any further discussion with Mr. Peel concerning the Idaho Falls store employees that were then working, that had replaced the strikers? [127]

(Testimony of Clarence P. Lott.)

A. You mean after the April ninth?

Q. (By Mr. Roll): No, in the course of the April ninth meeting, or immediately following its adjournment, did you discuss with Mr. Peel anything concerning those people who were working behind the picket line?

A. Oh, we probably for ten or fifteen minutes there was a discussion there of the situation as it evolved in Idaho Falls, and he said he was very happy with the employees that he had, and that he had no reason to discharge them.

Q. I will reach it another way, Mr. Lott. Did you following the April ninth meeting in Salt Lake with the employees who were working at Idaho Falls?

A. Yes, we did.

Q. At whose suggestion did you meet with those employees?

A. It was out of a discussion that involved Mr. Peel, that if——

Q. Now, when did this discussion take place?

A. That took place in the Industrial Council Chambers before we left.

Q. On what date?

A. On April ninth.

Q. All right. Now, will you tell us what your discussion with Mr. Peel was?

A. That if we could get those people into the Union it would probably clarify the situation as to where he could enter a [128] contract—enter into a contract with us.

Q. Now, are you referring now to Mr. Peel's sug-

(Testimony of Clarence P. Lott.)

gestion that you get the people who were working behind the picket-line to join the Union?

A. That's correct.

Q. Did you thereafter meet with the employees?

A. Yes.

Q. Do you remember about what date?

A. About April thirteenth.

Q. Who was present?

A. Mr. Mattox and myself, and the employees, and one salesman.

Q. Where did the meeting take place?

A. In a box car right to the side of the operations, where they were unloading, I think they were unloading sugar.

Q. Did you ask permission of Mr. Walker to talk to the employees at that time?

A. I did.

Q. What was your conversation with Mr. Walker?

A. I asked him if Mr. Peel had contacted him about—in reference to us meeting with the employees, and he said that he had, and that we were free to go back and hold a discussion with the employees.

Q. And did you? A. Yes. [129]

Q. (By Mr. Roll): Did you then talk to Mr. Walker? A. Yes, after the meeting.

Q. What was the discussion between yourself and Mr. Walker?

A. The meeting that we had with the employees was in fact so long that Mr. Walker came back in

(Testimony of Clarence P. Lott.)

and said, "These employees have got work to do, and you are holding them up on doing their work." And I told him that was fine, we would let the boys go back to work. And we went back in the warehouse, and I told Mr. Peel (sic), asked him to reinstate the employees, that he had coerced the—or coached the employees that he had presently hired not to join the Union, and that he was interfering in that respect with those employees, and asked him if—to reinstate the other employees, and he said he would never reinstate them.

Q. Now, I believe you said you came back and talked to Mr. Peel. Did you mean Mister——

A. Mr. Walker.

Q. Mr. Walker?

A. In the warehouse.

Q. Did you indicate to him what the employees had told you, that you formed your opinion that he was interfering?

A. Yes, I did.

Q. What did you say?

A. I told him that he had promised them everything—that the employees had indicated to us that they had promised them [130] everything that they would gain in the negotiations out of Salt Lake, and that they were foolish to join the Union, and if they joined the Union they would probably be in the same position, they would be out on strike, too, the Union would ask them to come out on strike.

Q. (By Mr. Callister): Who said this?

A. The employees, that Mr. Walker had informed them that. And that's what I based my

(Testimony of Clarence P. Lott.)

opinion on of him talking against the employees joining the Union.

Q. (By Mr. Roll): And did you testify that at that time you asked Mr. Walker to reinstate the striking employees?

A. Yes, when we went back into the warehouse, and he said he would never—made the statement that he would never reinstate them. And then—

* * * * * [131]

Q. (By Mr. Roll): Did Local nine eighty-three authorize Mr. Latter of the Salt Lake Council to negotiate a contract on behalf of Local nine eighty-three? A. They did not.

Q. Did they authorize him as an individual to negotiate toward a contract?

A. They did not.

Q. Was the Salt Lake Council authorized to enter into negotiations with Symns Grocer in behalf of Local nine eighty-three? [133]

A. They were not.

Q. (By Mr. Roll): Who signs the contracts for the Salt Lake Council?

A. When you speak of the Council, the Joint Council?

Q. No, I am talking about the grocery contracts for the Salt Lake area. Do you know who signs those contracts?

A. No; I think it was developed there that each company signed individually.

Q. I mean in behalf of the Union.

A. Oh, in behalf of the Union?

(Testimony of Clarence P. Lott.)

Q. Yes. A. Fullmer Latter.

Q. Was anyone in Salt Lake authorized to sign a contract in behalf of nine eighty-three?

A. Not, it was not, it's impossible.

Q. Who were the authorized bargaining agents of nine eighty-three?

A. Eddy Mattox or myself.

Q. How often do you normally go to Salt Lake in the course of union business, Mr. Lott?

A. Oh, that will vary sometimes with the time of year; in the spring of the year we are—I am down there on an average, I would say, of once every three weeks; sometime in the fall or winter it's about once a month.

Q. In nineteen fifty, from September to December, do you [134] know the approximate number of times you were in Salt Lake?

A. From September to when?

Q. (By Mr. Roll): To December.

A. I don't think I was there over twice during that time. [135]

* * * * *

Q. From January first, through April ninth, do you recall the number of times that you were in Salt Lake?—Nineteen fifty-one.

A. I was there only once during the first part of January, and I was again there in the first part of March, and I was again there in the latter part of March, the twenty-seventh. I was not there any time between those.

* * * * * [136]

(Testimony of Clarence P. Lott.)

Q. (By Mr. Roll): During that period did you go to Salt Lake that you did not call Mr. Peel?

A. I did not. I passed through Salt Lake once on my return—— [137]

Q. (By Mr. Roll): Will you repeat your answer, Mr. Lott, please?

A. I did not. I passed through Salt Lake in the evening that I did not contact Mr. Peel, on my return from San Francisco.

* * * * * [138]

Q. (By Mr. Roll): Was there a city designated by agreement between yourself and Mr. Peel in which negotiations for the Idaho Falls operations was to be conducted?

A. I requested that Mr. Peel come to Idaho Falls for negotiations, and he promised that he would come to Idaho Falls——

Mr. Callister: Now, just a minute——

Mr. Roll: I will connect it up.

A. But he never set any specific dates, and he never did come to Idaho Falls.

Q. (By Mr. Roll): Now, when did you have this conversation with Mr. Peel, or the first one?

A. The first one was in October.

Q. And at that time did you ask Mr. Peel to come up to Idaho Falls? A. I did.

Q. Now, did you have another such discussion with Mr. Peel?

A. I did, on January the sixth. [139]

Q. (By Mr. Roll): And at that time did you ask Mr. Peel to come to Idaho Falls?

(Testimony of Clarence P. Lott.)

A. I did.

* * * * * [140]

A. Well, may I clarify it for the Examiner why we would call in Salt Lake City and ask Mr. Peel to come?

* * * * * [141]

Trial Examiner Doyle: Yes, I would like to know.

A. The negotiations, as we carry them on, is usually carried on with the local manager in connection with whoever negotiates the contract, so that the local manager in administering the contract understands it. If we go to Salt Lake City or San Francisco without the local management being in on the negotiations, it's a foreign document to him to administer.

Q. (By Trial Examiner Doyle): Well, in this case, as I understood it, Mr. Walker said he had no authority to negotiate, at all, and Mr. Peel would have to do it. Now, Peel was in Salt Lake City, and you were in Salt Lake City?

A. That's right, but we insist on the negotiations carrying on in the city in which the operations of the local manager may sit in, so that when it's administered it's not a foreign document.

Q. Did you offer to go over and negotiate with Peel in Salt Lake City, when you were there with him?

A. Yes. * * * * *

Q. (By Mr. Roll): Do you know the—strike that, please. [142] Did the strike continue following April ninth?

A. It did.

(Testimony of Clarence P. Lott.)

Q. (By Mr. Roll): What was the date the picket line was removed?

A. May eighteenth, of Nineteen fifty-one.

* * * * *

Q. (By Trial Examiner Doyle): Are you familiar with when the strike began in Salt Lake City? A. Yes.

Q. On what date did it begin? .

A. March fourteenth.

Q. On the same date as your strike in Idaho Falls?

A. No, the strike in Idaho Falls began on March fifteenth.

Q. The day afterwards?

A. The day following.

Q. Had you conferred with the people at Salt Lake City in regard to their strike before you called your own here in Idaho Falls?

A. The only thing we requested of Salt Lake is that if they went on strike would they notify us that they were going on strike, and at what date they intended to go on strike. [143]

Q. (By Trial Examiner Doyle): And did you get notification from them that they were going on strike? A. Yes.

Q. And when did you get that?

A. The morning of March fourteenth.

Q. And then did you take a strike vote, or something of that sort, here? A. That's right.

Q. And you decided to go on strike, too?

A. Yes.

(Testimony of Clarence P. Lott.)

Q. Now, when the parties got together in Salt Lake were you notified by the Union or the company—or, the Council in Salt Lake that they were meeting there for the purpose of negotiating a contract in Salt Lake?

A. Never, only when the strike—after the strike involved (sic) I requested that any conciliations meetings that I would like to attend, I would like notification and be able to attend. Prior to that I was never notified, and knew nothing of the negotiations, or the dates, or any dates that were set for negotiations, or what carried on or to what transpired.

Q. Now, the first time that you, that is, your Local and the Salt Lake Local got together to talk to Mr. Peel, or any other employer, was when?

A. March twenty-seventh.

* * * * * [144]

Cross Examination

Q. (By Mr. Callister): Mr. Lott, you referred to Joint Council sixty-seven in these proceedings.

A. That's correct.

Q. Now, that Joint Council sixty-seven is made up of what Locals?

A. Local nine eighty-three, Local——

Q. Now, nine eighty-three is at Pocatello?

A. Pocatello.

Q. And embraces the—what is known as the territory of Idaho Falls? Is that correct?

A. The southeastern part of the State of Idaho.

(Testimony of Clarence P. Lott.)

Q. Uh huh. And what other Locals are there?

A. Nine seventy-six at Ogden——

Q. That's Ogden, Utah?

A. Ogden, Utah. Two twenty-two at Salt Lake, Utah, four eighty-three at Boise, Idaho.

Q. Now, Mr. Latter is the Secretary of that Joint Council, isn't he? A. That's correct.

Q. And whenever you have negotiations with respect to the [145] Joint Council, Mr. Latter usually is the spokesman, isn't he?

A. What do you have reference to when you say in connection with Joint Council?

Q. (By Mr. Callister): Well, at the present time you are engaged in negotiations with the trucking industry, are you not? A. That's correct.

Q. And in which your Local, the Ogden Local, the Salt Lake Local, and the Boise Local are bargaining, aren't you? A. That's right.

Q. And which is a uniform contract of what is known as the territory of the Joint Council sixty-seven, isn't it?

A. Well, it's—it embodies the territory, but it's individually signed by all the——

Q. Just answer my question, Mr. Lott. It's the group of those four Locals, isn't it? A. Yes.

Q. And Mr. Latter is the spokesman, isn't he, or the chairman of the group?

A. No. For expediting matters, Mr. Latter, the same as your group, designates one man that will ordinarily do most of the talking.

Q. Well——

(Testimony of Clarence P. Lott.)

A. But, he is not the spokesman. He does not speak for any Local Union outside of his own.

Q. Now, you know this, don't you, Mr. Lott, that I have many [146] matters with Mr. Latter pertaining to your Local and the Boise Local and the Ogden Local, don't you? A. Yes.

Q. (By Mr. Callister): That's right. And isn't Mr. Latter, in substance, your boss——

A. No.

Q. ——directing your activities?

A. Absolutely has no authority over me, whatsoever.

Q. Well, now, isn't this true, that the Joint Council has meetings or conventions, or whatever you term it, from time to time, embracing those four Locals, don't you? A. That's correct.

Q. And Mr. Latter calls them, doesn't he?

A. No.

Q. Doesn't he? A. No.

Q. Doesn't Mr. Latter act as chairman of that group? A. No.

Q. Who is the chairman?

A. Mr. Baldwin.

* * * * * [147]

Q. Now, in this meeting that you have referred to of March twenty-seventh, at the Industrial Relations Council office—you have been in that place on numerous occasions prior to the twenty-seventh, haven't you?

A. No, that was my first visit.

Q. Was that your first visit? A. Yes.

(Testimony of Clarence P. Lott.)

Q. Well, as I understand your testimony, you were there on the twenty-seventh of March?

A. I was. [148]

Q. (By Mr. Callister): As I recall, you said who was there, and as I recall—and I may say to the Examiner this is important. I am not just rehashing. Frankly, I have a point involved—was Mr. Peel, myself, Mr. Smith, Mr. Scowcroft, Mr. Hampton, yourself, Mr. Latter, Mr. Mattox—

A. Mr. Mattox was not there.

Q. Well, that is a point I was going to correct. And who else was there?

A. I am not sure about Mr. Hampton, whether Mr. Hampton was there.

Q. Uh huh. Was Mr. Thoreson?

A. I think Mr. Thoreson was there.

Q. It was Mr. Thoreson?

A. Mr. Thoreson.

Q. Now, was there anyone else there, Mr. Lott?

A. You were there at the opening.

Q. Yes, I mentioned myself, that's right. Was there anyone else that was there?

A. Yes, there was four or five—there was a representative of each employee—an employee from each group that was—

* * * * * [149]

Q. Was that the first meeting that you went to the Council on? A. That was the first one.

Q. And when was the next one?

A. On April ninth.

* * * * * [150]

(Testimony of Clarence P. Lott.)

Q. (By Mr. Callister): Now, you knew, did you not, that the Salt Lake negotiations were going to begin in the month of January of Nineteen fifty-one?

A. Not in October.

Q. Well, did you ever know just prior to the fore part of January of Nineteen fifty-one that the contract of the Salt Lake wholesalers, which we have referred to for Price, Ogden and Salt Lake, were to be reopened?

A. Not until Mr. Peel informed me of that fact in January.

* * * * * [152]

Q. (By Mr. Callister): Well, let me ask you this: Did you ever discuss with Mr. Latter your proposal to Mr. Peel of Symns Wholesale Grocer at any time?

A. No, sir.

Q. You never discussed with Mr. Latter your proposal?

A. No, sir.

Q. When was the first time you had a conversation, if any, with Mr. Latter with regard to the Symns Wholesale matter in Idaho Falls?

A. On February the twenty-eighth, or first of March, when I was in there in that period of time; and then my conversation was more with Mr. Bailey. I was referred to Mr. Bailey by Mr. Latter when I asked him how the negotiations was coming on the grocery warehouses, and he said that Mr. Bailey was more familiar with that, and could go into it in more detail than he could.

Q. So that, if I understand you correctly, Mr. Lott, your testimony is to the effect that you never

(Testimony of Clarence P. Lott.)

knew anything about the Salt Lake negotiations for the wholesale warehouses, or the wholesale grocers, I mean, until the latter part of February or the first part of March?

A. I knew—as I said, Mr. Peel informed me that the contract was open, but I never knew of any dates, nor any meetings, nor any negotiations that was held prior to March first.

Q. What I am getting at is this: I understand that during [154] this period from January to March first you never communicated with Mr. Latter or Mr. Bailey, or any representative of the Joint Council pertaining to the negotiations of the wholesale grocers?

A. That's correct.

Q. (By Mr. Callister): Do you know whether or not Mr. Mattox did?

A. No, I couldn't say whether Mr. Mattox did, or not. That was—Mr. Mattox would have to answer that question.

Q. When did you ask the Teamsters Local two twenty-two if they were going out on strike to let you know?

A. On March first, after I had talked to Mr. Peel.

Q. Now, on these visits to Salt Lake City, as I understand it, you while in Salt Lake would call Mr. Peel on the telephone, is that correct?

A. I did, on the three occasions.

* * * * * [155]

Q. (By Mr. Callister): Do you recall who re-

(Testimony of Clarence P. Lott.)

quested you to come to Salt Lake on April the ninth, if anyone?

A. I was not requested.

Q. You just happened to come down?

A. No; I again asked—when I left there on the twenty-seventh, I asked if there were any additional meetings that I would like to be notified of those meetings, that I would like to make an attempt to settle the strike at Idaho Falls in connection with Symns. And I was notified of the meeting on a Sunday evening that they were going to meet with the Conciliation Service the next morning, April ninth.

Q. Now, as I further understand it, you struck the day after Salt Lake struck?

A. That's correct.

Q. Now, did you ever write Mr. Peel—you said you had written him. Did you ever answer Mr. Peel's counter-proposal, which is known as Exhibit G-Three?

A. Personally, I did not. Can I go into that without [156] answering just yes or no?

Q. (By Mr. Callister): Well, now, let's see if we can get the answer, because your counsel—

Trial Examiner Doyle: I think that is capable of an answer. Did you ever answer the proposal?

A. Well, I can't answer it without—yes or no, without a damaging answer.

Q. (By Mr. Callister): Well—

A. We answered the proposals, yes, but not by communication.

(Testimony of Clarence P. Lott.)

Q. All right, that's all there is to it. How did you answer it?

A. Mr. Mattox, I instructed him to meet with Mr. Peel.

Q. And when was this?

A. November twenty-fourth Mr. Mattox informed me that he would like to spend the Thanksgiving in Salt Lake, so I instructed him to, instead of coming back into Idaho Falls for Friday, to make an attempt to meet with Mr. Peel the following Friday or Saturday, and not only Mr. Peel but there was one other operator in the territory, to see what he could do in the negotiations of a contract.

Q. Now, do you know who accompanied Mr. Mattox in that meeting? A. I do.

Q. Who was there with him?

A. Mr. Garrett. [157]

Q. (By Mr. Callister): All right. Now, who is Mr. Garrett? What's his first name?

A. Harry Garrett.

Q. And what is his position?

A. He is a statistician of the Joint Council.

Q. And where is his office?

A. In Salt Lake City.

Q. With Mr. Latter, isn't it? A. No.

Q. It's in the same building with Mr. Latter, isn't it? A. Why, yes.

Q. Yes.

A. There's the Machinists in the same building, and there's the Musicians in the same building.

Q. Mr. Lott,—

(Testimony of Clarence P. Lott.)

A. I would like to clarify that, if I may, Mr. Examiner.

Trial Examiner Doyle: Well, now, just a minute. There's no use of us getting into any difficulty about this. You understand what counsel is driving at, and he understands you. Now, he wanted to know—Is the statistician an official of the Joint Council?

A. He is an employee of the Joint Council; he is on our payroll, and I am as much his boss as Mr. Latter is.

* * * * * [158]

Q. (By Trial Examiner Doyle): Now, at the time the Idaho Falls Local struck here, did they present any demands to the company?

A. You mean right at the time?

Q. Immediately prior to the strike?

A. No, they did not.

Q. Did they present any demands to the company within a week before they struck?

A. Well, two weeks before, I stated to you, or stated in the record that I talked to Peel and he simply told me I did not represent the people, that I could go ahead, that I had no Union membership in the—or, the Local had no Union membership in the operation, that I didn't represent his people.

Q. You say he said that to you within two weeks before the strike?

A. Yes.

(Testimony of Clarence P. Lott.)

Q. And that was shortly after the election of the Board—Right?

A. No. No, two weeks before the strike was on March first. The election was held in September.

Q. Well, you had demonstrated and proven that you represented these people in the election a long time prior to this—Right? [161]

A. That's correct.

Q. (By Trial Examiner Doyle): Now, did you at any time give them notice, by letter or anything else, that because they did not negotiate with you that you were going to strike?

A. No, not by letter.

Q. Now, after the strike was on did you in any way communicate to anybody for the company the reason for your strike?

A. Mr. Walker knew the reason for the strike. He was told that the employees voted to strike because of the failure to get a contract.

Q. When was Mr. Walker told that?

A. The employees voted on the fourth (sic), and he was told that on the fifteenth, the morning they went out, the reason that they were striking.

* * * * *

A. I couldn't see any object, when I was informed definitely that we better go ahead if we wanted to, and that we did not represent the people, and that they wouldn't go out on strike, there was only one result, as I informed you, to let the employees decide it, and they decided the issue.

Q. (By Trial Examiner Doyle): Now, the strike

(Testimony of Clarence P. Lott.)

at Salt Lake City—Did you know the reason for the strike at Salt Lake City? A. Yes.

Q. And that was over what?

A. Over wages.

Q. Had you asked the company for any increase in wages similar to that asked in Salt Lake City?

A. Yes, I asked Mr. Peel for a commitment, if he would make a commitment that they would give us the same increase that was brought out in the negotiations on March first, and he absolutely refused.

Q. Well, that was after the strike commenced?

A. No, that was January—or, March first. That's what caused the strike.

Q. That was before the strike?

A. That's what caused the strike, because he absolutely said that he would not make any commitment. * * * * * [163]

Q. (By Trial Examiner Doyle): Now, as I understand the situation, you had the strike on down at Salt Lake City, and there were some negotiators meeting with the Council, or the association of warehousemen there, and you had your strike on here at Idaho Falls—Right?—at the same time?

A. (Witness nodded his head in the affirmative.)

Q. Now, it was during that—

Mr. Roll: Speak up. [164]

A. There was no—I may be wrong, but I don't think there was any meetings held between when the strike developed in Salt Lake, that I know of, until the twenty-seventh of March. There was meet-

(Testimony of Clarence P. Lott.)

ings held—The Conciliation Service was called in, and the Conciliator was the one that brought the people together.

Q. (By Trial Examiner Doyle): Brought the parties together?

A. Brought the parties together.

Q. I see.

A. There was no meetings, that I know of, because I requested that if any meetings were set up while the parties were on strike there that we be notified and have an opportunity to be there.

Q. Well, I understand, then, your testimony to be that during that period no one of the Joint Council at Salt Lake City told you anything about what was happening in the strike there?

A. That's right. I requested them that if any meetings was set up that I be notified, and the first notification I got was of March twenty-seventh.

Q. Did you have any arrangement with the men who were handling the affairs for the Union there that the negotiations concerning Idaho Falls was to wait upon negotiations at Salt Lake City?

A. None, whatever.

Q. Did you actually try to contact any—Mr. Peel representing [165] the company to have negotiations regarding Idaho Falls at that time, while the strike was pending in Salt Lake City, prior to the time the Conciliator got in there?

A. No, I did not.

Q. (By Trial Examiner Doyle): Then, as I get the picture, you had this strike here, they had the

(Testimony of Clarence P. Lott.)

strike in Salt Lake, and nothing was done for a period of about ten days until they got the Conciliator in it, who got the parties together?

A. Mr. Examiner, I might explain this. My office is at Pocatello; Mr. Mattox was stationed here, as a local representative, and had full authority to sit down and negotiate a contract, and was handling the strike from the local standpoint, and relayed some of the information. Now, I say, I think, as the counsel brought out, he didn't want me to testify as to what Mr. Mattox might have done in connection with that.

Q. As far as you know, that is about the situation, wasn't it?

A. No, I know of other things. As I say, I directed Mr. Mattox in some of his activities, but I did not want to testify into what direction that had—as to what had transpired.

Q. All right. I want to have that picture. It's not criticism that you didn't do it. Sometimes these things just sit there, and only time will get people to come together when there is a stalemate. But, I wanted to see if that was the [166] picture.

A. The only two that had authority in the Symns Grocer to negotiate a contract was Mr. Mattox or myself, had full authority to sign it.

* * * * *

Redirect Examination

Q. (By Mr. Roll): Mr. Lott, you testified that your office is in Pocatello, Idaho?

A. Yes.

(Testimony of Clarence P. Lott.)

Q. And that the office of Mr. Mattox was in Idaho Falls? A. Yes.

Q. Would you state the distance between those two points?

A. Fifty-four miles, approximately.

Q. In the normal course, how frequently do you visit the Idaho Falls office?

A. Well, if everything is going well, and the local business representative can take care of the beefs, it would be a matter in the course of probably a month or six weeks. If there is difficulty in negotiations in which he is trying to carry on, or he requests my presence and aid in helping out up here I come up.

* * * * * [167]

Q. (By Mr. Roll): Who notified you, Mr. Lott, of the March twenty-seventh meeting in Salt Lake?

A. Mr. Latter's office girl, I think, Miss Christensen.

Q. And who notified you of the April ninth meeting in Salt Lake?

A. Mr. Latter personally. It was on a Sunday.

Q. Do you know who notified the other participants with respect to the March twenty-seventh meeting?

A. Not definitely, but I think it was the U. S. Conciliation Service.

Q. Do you know the percentage of the employees of Symns Grocer in Idaho Falls that struck on March fifteenth?

A. One hundred percent, every one of them.

(Testimony of Clarence P. Lott.)

Mr. Roll: I think that's all, Mr. Lott.

Recross Examination

* * * * * [170]

Q. (By Mr. Callister): Now, Mr. Lott, you knew, as a matter of fact, didn't you, that Mr. Lyle Johnson, the representative of the Conciliation Service of the Department of Labor, had been involved, or had been having meetings sometime prior to March first, didn't you, or did you know that?

A. No, I did not. I did not request, until I was down there on March first, of the Salt Lake Local that they notify me of any meetings set up by the U.S. Conciliation Service. * * * * * [173]

ERNEST TAYLOR BAILEY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Trial Examiner Doyle): Give us your full name and address, Mr. Bailey.

A. Ernest Taylor Bailey, Nineteen thirty-six South, Seventeenth East, Salt Lake City, Utah.

Q. (By Mr. Roll): What is your occupation, Mr. Bailey?

A. I am a business representative for the Teamsters Union, Local two twenty-two.

Q. How long have you held that position?

A. Approximately six years.

(Testimony of Ernest Taylor Bailey.)

Q. Did you participate in the Salt Lake negotiations in the spring of Nineteen—or in the early part of Nineteen fifty-one? A. I did. [175]

Q. (By Mr. Roll): Did you attend the meetings that were conducted there? A. Yes.

Q. Did you make records of your own of what occurred at those meetings?

A. Well, we keep minutes on most of them.

Q. Did you——

Q. (By Mr. Callister): You say you did keep minutes of them, Mr. Bailey?

A. On part of them. Most of them, I think.

Q. (By Mr. Roll): Do you know the first such meeting that Mr. Lott attended?

A. He attended the March twenty-seventh meeting, first.

Q. Was that the first meeting that he attended?

A. Yes.

* * * * *

Q. (By Mr. Roll): Did you hear Mr. Lott's testimony with respect to who all attended that meeting?

A. I did.

Q. Were all of those persons present that—whom he named? [176] A. Yes.

Q. (By Mr. Roll): Do you know any others there that were present?—that he did not name.

A. Well, only the employees that were there. I know some of them.

Q. I think we need not name them. Do you know whether, in particular, Mr. A. B. Smith was

(Testimony of Ernest Taylor Bailey.)

present representing Utah Wholesale Grocery Company? A. Yes, he was there.

Q. Do you know whether Mr. Peel was present representing Symns Grocer Co?

A. Yes, he was there.

Q. Did Mr. Lott address that meeting?

A. Well, yes.

Q. Will you state the circumstances, and what he said?

A. Well, the Conciliator didn't know all the people—We had had several meetings with the Conciliator before that time, but never such a large body; there was people there at this particular meeting that hadn't been there before, namely, the employees, Mr. Callister and Mr. Lott, was the ones that hadn't been there before, and the Conciliator asked for—seeing that he didn't know them all, for them to state who they were, and who they represented. And Mr. Lott stated that he was there for the Idaho Falls Local—or, the Pocatello Local nine eighty-three, and was representing the Idaho Falls part of the [177] Symns Grocer Company. And Mr. Callister raised the question as to whether he had any right to be there, and there was quite an argument ensued, that is, a discussion, I guess you may call it, and Mr. Lott said that he was there in behalf of his employees, that they were out on strike because they hadn't been successful in getting Mr. Peel to negotiate with them, and, as a matter of fact, they would like to try and get it settled along with the Salt Lake deal. But, they didn't see fit—

(Testimony of Ernest Taylor Bailey.)

The Conciliator said that he would have to go along, that they had no notice from the Seattle Board for them for them to sit in on this thing, and so he would have to rule that they would have to not attend, but it was then later decided that they could stay there as spectators only.

Q. (By Mr. Roll): Did the meeting progress following that? A. It did.

Q. Did you hear a statement by Mr. Peel, or anyone else, with respect to Mr. Lott's participation? Did others than the Conciliator discuss it?

A. Well, I think there was several talked about it there, and it was agreed that he should stay there.

Q. Can you name those that did talk, those that you remember?

A. I think Mr. Peel had something to say about it, Mr. Smith had something to say about it, and Mr. Hansen had something to say about it. [178]

Q. (By Mr. Roll): Have you stated the extent of Mr. Lott's statement to the group, giving reasons why he desired to participate?

A. Well, he just stated that he was there in behalf of the boys in Idaho Falls, and that he wanted to get a contract, and that he felt as though that they had refused to bargain with him, as I recall it, and he was there trying to see if he couldn't get them to bargain at the same time that we were in Salt Lake.

Q. Did the meeting then progress in ordinary form? A. Yes.

Q. Did Mr. Lott participate in the discussion?

(Testimony of Ernest Taylor Bailey.)

A. No, he didn't.

Q. When was the—What was the result of that meeting?

A. Well, the Conciliator took the employers into the other room, and they were gone quite some time, and he finally came back and said that he had an offer to make us, which he did, which was a settlement of thirteen cents an hour, six cents to go into effect immediately, and the seven cents to be sent to the Board, and also a maintenance——

Q. May I interrupt. Was the result of that meeting that an agreement was reached between certain of the parties?

A. Yes, Utah Wholesale and Scowcrofts, but that he, Mr. Peel, would not agree to taking the men who were working on his plant off the job for—so that the men who were striking [179] could go back to work at that time.

Q. (By Mr. Roll): Were there men working at that time in Mr. Peel's Salt Lake store?

A. Yes.

Q. What did you do following that meeting?

A. Well, I contact these fellows, from day to day——

Q. What fellows?

A. The ones that were working at Symns, that he had hired, and I finally got them to agree to come into a meeting, which they did, and we talked it over with them on the situation, and they all joined the Union, and then they didn't go back to work.

(Testimony of Ernest Taylor Bailey.)

Q. And what date was that?

A. I held the meeting on Thursday, the fifth, and they never went back to work Friday, the sixth.

Q. Did they work Saturday, the seventh?

A. No, they never worked any more, at all.

Q. Nor Sunday, the eighth? A. No.

Q. When was the next meeting?

A. Monday, the ninth.

Q. And who all attended that meeting?

A. Well, there was Mr. Johnson, Mr. Latter, myself, Mr. Peel, Mr. Mattox, and Mr. Lott.

Q. What happened at that meeting? [180]

A. Well, the Conciliator again came back with the—with an offer that they would settle the Salt Lake part of Symns on the same basis that we had settled the others, but that he would not settle the Idaho Falls, because he was not going to remove the men who were working on the Idaho Falls job; that there were no men that he had hired during the strike on the Salt Lake job. There were three men who were there before, and were still there, but they were not involved in coming off the job, because they were there before we went on strike.

Q. (By Mr. Roll): Did that agreement contain any form of Union security?

A. Maintenance of membership, the same as the other two.

Q. Had there been any Union security in the prior grocery—wholesale grocery agreements?

A. No, just an Open Shop agreement.

Q. Did anyone at that meeting representing

(Testimony of Ernest Taylor Bailey.)

Symns Grocer offer to sign the same contract for the Symns Idaho Falls store?

A. No, not while I was there. I left. After the Conciliator gave us that information, Mr. Lott and Mr. Latter had a little conference there, and Mr. Latter immediately told me to go down and take the picket-line off, which I did, so I left at that point. I don't know what happened after that.

Q. Was the Salt Lake strike at Symns delayed in any respect because of the Idaho Falls strike?

A. If it was, I didn't know it.

Q. (By Mr. Roll): Would you have known it if that had occurred?

A. Well, I should think I would have, but I didn't know that it had happened.

Q. Is it one of your duties as business agent the negotiation of contracts?

A. I try to help, yes.

Q. Do you participate in the negotiations?

A. Yes.

Q. Did you participate representing your Local in the Salt Lake negotiations, was that your reason for being there?

A. Yes.

Q. Do you know—Did you have authority to negotiate on behalf of Local nine eighty-three?

A. No.

Q. Did you have authority or authorization from that Local to sign a contract in behalf of Local nine eighty-three? A. No.

Q. Do you know of your own knowledge whether

(Testimony of Ernest Taylor Bailey.)

Mr. Latter had authority to negotiate for nine eighty-three?

A. Not to my knowledge.

* * * * * [182]

Q. (By Mr. Roll): Did you hear a conversation between Mr. Latter and Mr. Peel at the April ninth meeting?

A. Only that when we were given the offer Mr. Latter asked Mr. Peel if he wouldn't extend the settlement into Idaho, and he still said and maintained that he would not remove the men who were working on the Idaho job.

Q. When you refer to "he" to whom are you referring? A. Mr. Peel.

Mr. Roll: That's all.

Cross Examination

* * * * * [183]

Q. (By Mr. Callister): Now, Mr. Bailey, the minutes that you referred to—you said you kept minutes of them—were you the one that kept the minutes of these meetings?

A. Some of them, possibly, but not all of them.
Mr. Latter—

Q. Who kept the minutes, do you know?

A. Well, for our Local, either Mr. Latter or myself.

Q. I see. Now, do you know whether or not—just think a moment—whether you had a meeting on the twenty-sixth day of March, as well as the twenty-seventh, do you recall that?

(Testimony of Ernest Taylor Bailey.)

A. I could look in my book and find out, if that is permissible.

Q. Surely. A. I have my——

Q. To refresh your memory, I want you to. We want the facts here.

A. I have my daily reminder.

Mr. Callister: Unless General Counsel has some objection. You have no objection, have you?

Mr. Roll: None, whatever.

Q. (By Mr. Callister): We just want the facts.

A. (Examining small book): On the twenty-sixth the only meeting I have was a general membership meeting, so I don't believe we did. [185]

Q. (By Mr. Callister): You didn't put it down if you did?

(No answer.)

Q. Now, are you sure, Mr. Bailey, that Mr. Peel was there at this first meeting of March twenty-seventh? A. Yes.

Mr. Callister: That's all.

Redirect Examination

Q. (By Mr. Roll): When you informed counsel that you worked under the direction of Mr. Latter, will you state by virtue of what circumstance are you under his direction? A. He is my boss.

Mr. Callister: That's the best answer I know of.

Q. (By Mr. Roll): If you occupied the same position in Local nine eighty-three that you occupy in Local two two two, would that same situation exist? * * * * * [186]

(Testimony of Ernest Taylor Bailey.)

A. Well, I would be working for a different man, if I worked for nine eighty-three.

Q. (By Mr. Roll): Who would you be working for in nine eighty-three, who would be your boss?

A. Mr. Lott.

Q. Do you recall, Mr. Bailey, whether you personally signed the contract in behalf of Local two twenty-two for the year Nineteen forty-nine to Fifty?

A. I usually sign it along with Mr. Latter.

* * * * * [187]

Redirect Examination

Q. (By Mr. Roll): Do you know of any agreement, Mr. Bailey, in which the Joint Council is a signatory, on behalf of the Union, with an individual employer, or with this group of employers?

A. No. * * * * * [189]

CHARLES ELMER GRAVES

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Trial Examiner Doyle): Will you please state your full name and address?

A. Charles Elmer Graves.

Mr. Callister: I will ask you to speak a little bit louder, if you will, please, so we can hear you.

A. Charles Elmer Graves, G-r-a-v-e-s.

(Testimony of Charles Elmer Graves.)

Q. (By Trial Examiner Doyle): And your address?

A. Seven ninety-seven, Tenth Street, Idaho Falls, Idaho.

Q. (By Mr. Roll): What is your occupation, Charley?

A. Warehouseman and truck driver.

Q. Have you ever worked for Symns Grocer Company? A. Yes.

Q. Do you remember when you began work?

A. I began in June of Nineteen forty-six.

Q. Who hired you?

A. Wallace McEntire.

Q. And what was his position at that time?

A. Manager, I guess.

Q. Thereafter, did you have another manager while you were in the company's employ?

A. Yes, I was under Emmett Walker.

Q. Was there a Union at the operation when you came to work? A. No.

Q. Was one formed during your employment, or did the employees join a union? [194]

A. Well, we voted for one.

Q. (By Mr. Roll): I see. Do you remember about when that was?

A. Yes, that was in September.

Q. Of what year? It is stipulated that it was September Nineteen fifty.

A. Yes, Nineteen fifty.

Q. And, so far as your memory served you, would that be the correct date?

(Testimony of Charles Elmer Graves.)

A. Yes, that's right.

Q. Did you have any conversation with any company official concerning the Union, Mr. Graves?

A. Yes, I had a conversation with Emmett Walker.

Q. About when did that occur?

A. Oh, about, I would say, about two weeks after the election.

Q. Where was that?

A. It was in the warehouse.

Q. Was there anyone else present at that time?

A. Yes, as close as I can remember, there was Glenn Reed and Don Fortush.

Q. About what time of day?

A. I believe it was in the morning. I am not sure about that.

Q. Will you relate the conversation, please, as nearly as [195] you can recall, what Mr. Walker said, what you said, and what the other people said?

A. Yes, Mr. Walker said, "You guys have been fooling with the Union again," and then the conversation went on, but I don't exactly recall what else was said, except that he told us that six men in Idaho Falls couldn't tell the Salt Lake office what to do. And he told us that Symms, he thought Symms was awfully fair to us, and I piped up and told him that I thought they was unfair in their vacation, when we would go right next door to Sew-crofts and get two weeks after three years, and only one weeks from Symms as long as you had been there. And he stated that he had been with

(Testimony of Charles Elmer Graves.)

Symms thirty some years and had only gotten one week, and sometimes hadn't taken any vacation, and I stated that that was his fault, not mine.

Q. (By Mr. Roll): Anything else in that conversation that you remember, Charley?

A. No, I don't believe—Oh, yes, there was too. He stated that if we didn't like our jobs we could quit. And Glenn Reed said something about he would quit, and I guess he did after a week or so; after that he did quit.

Q. Anything else that you can recall?

A. No, I believe that's all.

* * * * * [196]

Mr. Roll: It is the General Counsel's position that the—that Carson was not a supervisor within the meaning of the Act. The only extent to which the General Counsel expects to bind the company, concerning his statements and acts, is in the event of agency. That is, if he was told to do certain things, whether he was a supervisor or not, the company would be liable. I think that would be true with any employee.

Trial Examiner Doyle: What do you intend to prove here? This respondent has to meet the charges which you have leveled against them. Now, what is your position?

Mr. Roll: Our position is that Carson is not a supervisor. * * * * * [204]

Q. (By Mr. Roll): Did you engage in a strike?

A. Yes.

* * * * *

(Testimony of Charles Elmer Graves.)

Q. When did you leave the company's employ?

A. It was the fifteenth of March.

Q. Was that the date you struck? A. Yes.

Q. Have you been—Have you sought reemployment personally at the company? A. No.

Q. Has anyone offered you employment at the company since that time? A. No. * * * * *

HARRY W. GARRETT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Trial Examiner Doyle): Give us your full name and address.

A. Harry W. Garrett; Twenty-four South, Fifth East, Salt Lake City. [207]

Q. (By Mr. Roll): What is your occupation, Mr. Garrett?

A. Statistician for the Joint Council of Teamsters number sixty-seven.

Q. That's in Salt Lake, is it?

A. I have my headquarters in Salt Lake.

Q. Is Local nine eighty-three a member of the Joint Council? A. It is.

Q. Do you know Mr. Lott? A. I do.

Q. Will you state how long you have held the position of statistician?

A. Since June of Nineteen forty-three.

Q. Do you know Mr. Peel? A. I do.

(Testimony of Harry W. Garrett.)

Q. Do you know what his position is?

A. I know that he is acting as manager of the Symns Grocery. I believe that he is president of the company.

Q. Very well. Did you have occasion to meet with Mr. Symns (sic) in the year of Nineteen fifty?

A. I did.

Q. Did that matter concern Local nine eighty-three? A. It did.

Q. Will you state where that meeting took place?

A. In Mr. Peel's office.

Q. Was that in Salt Lake?

A. In Salt Lake City, yes. [208]

Q. (By Mr. Roll): Was there anyone else present? A. Yes, Mr. Mattox.

Q. And what is Mr. Mattox'—what was his position at that time?

A. Business representative of Teamsters Local number nine eighty-three.

Q. About what time of day did you meet?

A. About nine-thirty, a.m.

Q. And how long did the session last?

A. Approximately one hour.

Q. Will you relate what happened, stating as nearly as you can the words used or the conversation of each of the three parties?

A. Mr. Mattox came to my office that morning about ten—or about nine o'clock, and told me that——

Mr. Callister: Just a minute. Let's have the conversation.

(Testimony of Harry W. Garrett.)

Trial Examiner Doyle: Sustained.

Q. (By Mr. Roll): Just what occurred in Mr. Peel's office?

A. After introduction.—Mr. Peel, I believe, had never met Mr. Mattox before—and a short preliminary conversation. Mr. Mattox told Mr. Peel that he was there to negotiate a contract for the Symus employees in the Idaho branch, on the basis of the Union proposal which had previously been mailed to Mr. Peel by Local nine eighty-three. [209]

Q. (By Mr. Roll): Just a moment. Did we fix the date of this conversation?

A. I think not, thus far.

Q. Will you state what date this conversation occurred?

A. It was November 24, 1950.

Q. Very well. Now, go ahead.

A. And Mr. Peel, in effect, said that he did not desire to negotiate a contract for his employees in Idaho Falls at that time, because his employees who were members of Local number two two two in Utah would have their contract coming open early the next year, and he didn't want to negotiate terms for Idaho employees which would conflict with the terms that may come out the negotiations for his larger group of employees in Utah.

Q. Do you recall anything more in that conversation?

A. Yes, Mr. Mattox called his attention to the lapse of time between the date on which the Local nine eighty-three had been certified as representa-

(Testimony of Harry W. Garrett.)

tive of his employees, and that no negotiations had taken place up until that time, because no opportunity had been afforded, and that he felt strongly that the employees up here in Idaho Falls, members of Local Nine eighty-three, desired immediately—or immediate negotiations of a contract, and that he practically insisted that negotiations be entered into at that time. Mr. Peel reiterated his objections in about the same words. And then [210] Mr. Mattox suggested if he was going to maintain that attitude that he enter into negotiations for an interim contract, to remain in effect until the negotiations had completed—been completed in the Utah area, when a new contract for Idaho might be negotiated. Mr. Peel objected to that, and said that he could see no reason for entering into such negotiations, as financial matters surrounding the Idaho operations were not satisfactory, and that he didn't—if it didn't improve it could very well be that his Idaho operations would be closed down prior to completions of negotiations for the Utah area.

Q. (By Mr. Roll): Do you recall anything further in that conversation?

A. Yes, the reaction of Mr. Mattox to that was that it appeared that Mr. Peel simply——

Q. (By Mr. Callister): Well, now, is this his conversation, Mr. Garrett? Is this what Mister——

A. Yes; yes, Mr. Mattox said this, in effect—I don't pretend to quote him verbatim, but in effect it was this—that Mr. Mattox stated that it appeared that Mr. Peel simply did not desire to negotiate,

(Testimony of Harry W. Garrett.)

refused to negotiate a contract, either for a year as was proposed in the beginning, or an interim contract, and that he felt sure that the Idaho employees whom he represented, or Local nine eighty-three represented, would be very unhappy about such refusal.

Q. (By Mr. Roll): Was there any other discussion, that you [211] can recall along that line?

A. There was other conversation, but not of any importance to this, as far as I could remember.

* * * * *

Q. Did Mr. Mattox at that time have with him a proposed contract to negotiate on?

A. He said he did.

Q. Were any of the provisions of the contract discussed at that time?

A. I don't recall a discussion of any of the provisions, except that, as I remember it, Mr. Peel stated that he noticed there was a proposal for a Union Shop in this Union proposal, and his company would never grant any form of Union security. That is about all I recollect in that respect. But, so far as other discussions of wage rates, or anything of the sort, I recollect no discussion of it. If there was any discussion [212] on them I don't recall it. It has been quite a while ago.

Q. (By Mr. Roll): Do you recall any further discussion concerning the Union Shop?

A. No, I don't recall any further discussion, except that, of course, Mr. Mattox said that they had proposed it and wanted it, and reminded Mr. Peel

(Testimony of Harry W. Garrett.)

that the employees had voted for it, or to authorize the Union to negotiate it if they could; and that the employees had expressed their desire in an election for the Union shop, and that Local nine eighty-three expected to get it.

* * * * * [213]

Q. (By Mr. Roll): I will rephrase the question, Mr. Garrett. Specifically, was there anything in this conversation, [213] that you remember, concerning whether the company expected to continue its operations, or whether it might close its operations?

A. Well, I believe I stated before that Mr. Peel made the statement that if financial matters did not improve in the Idaho operations that the operations may be closed. Meaning, I assume, that he would go out of business here prior to the negotiation of the contract in Utah. And, I do recall one more thing just in connection with that now, that Mr. Peel said that conditions in this Idaho Falls branch would necessitate his coming to Idaho Falls in the fairly near future, which I took to be within a month or so, anyway, and that he would, that he expected to at that time contact the Union here with reference to negotiations.

Q. (By Mr. Roll): And by "here" you mean Idaho Falls?

A. In Idaho Falls, yes. That's the only thing I recollect concerning his statement of his hopes for this operation here.

Mr. Roll: That's all.

(Testimony of Harry W. Garrett.)

Cross Examination

Q. (By Mr. Callister): Mr. Garrett, did Mr. Mattox deliver at that conference a counter-proposal, in writing, to Mr. Peel's proposal?

A. I don't recollect such.

* * * * * [214]

EDWARD J. MATTOX

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Trial Examiner Doyle): Will you please state your full name, and residence address?

A. Edward J. Mattox, Three ten, Washington Street, Boise, Idaho.

Q. (By Mr. Roll): What is your occupation, Mr. Mattox? A. Business representative.

Q. Of the Teamsters Union?

A. Teamsters Union four eighty-three, now.

Q. And where is that?

A. Boise, Idaho.

Q. Have you ever been a representative of Local nine eighty-three, in Idaho Falls?

A. I was until December of last year.

Q. When did you begin, when did you assume that position in Idaho Falls?

A. February of Nineteen forty-nine.

Q. And you left when?

A. Beg your pardon? [215]

(Testimony of Edward J. Mattox.)

Q. (By Mr. Roll): And you left when?

A. December of Nineteen fifty-one.

Q. What area did your Idaho Falls office cover?

A. Extends to the north as far as the Park——

Q. How many miles?

A. Approximately a hundred, in a northerly direction, and northwesterly to Salmon, Idaho, and extended as far south as the Utah border.

Q. And generally, then, would that be approximately a hundred-mile radius from Idaho Falls?

A. Yes, I would say a hundred to a hundred and fifty.

Q. Did your work require that you travel some in connection with your duties?

A. That is correct.

Q. Would it necessitate your being absent from Idaho Falls over long periods of time?

A. No, sir, just on short—occasional short overnight trips.

Q. Occasionally, you would be gone overnight?

A. Yes.

Q. Did you maintain an office?

A. Yes, sir.

Q. Where was that? A. Idaho Falls.

Q. In what building?

A. In the Labor Temple. [216]

Q. (By Mr. Roll): Did you have a secretary, or stenographic help? A. Yes, sir.

Q. Were they full time employees?

A. Yes, sir.

Q. In your absence were they on duty?

(Testimony of Edward J. Mattox.)

A. Yes, sir, always.

Q. Did you have occasion to conduct organizational work among the employees of Symns Grocer Company? A. I did.

Q. About when did you commence that organization?

A. Originally, you mean, when I first organized them?

Q. Yes.

A. Well, it was Nineteen forty-nine.

Q. Did negotiation result? A. No, sir.

Q. Did you organize further, make further attempts? A. Yes, I did.

Q. When was the next time?

A. August of the following year.

Q. Of Nineteen fifty?

A. That's correct.

Q. Following that organization, I believe it is stipulated by counsel that two elections were held?

A. That is correct.

* * * * * [217]

Q. (By Mr. Roll): Following those elections, did you contact any of the company officials?

A. I did.

Q. Who was the first person you contacted?

A. Mr. Walker.

Q. And what was his position?

A. He was manager of the local branch of Symns Grocery Company.

Q. And that is located in Idaho Falls, the same city where your office is located?

(Testimony of Edward J. Mattox.)

A. That is correct.

Q. About when did you talk to Mr. Walker?

A. I talked to him, the first occasion was sometime in August. I organized the operation in the early part of August. I contacted Mr. Walker in the Idaho Falls warehouse, and he, of course, referred me to Mr. Peel, and advised me that he wouldn't be able to talk negotiations, as that was a matter that was always handled in Salt Lake.

Q. When you said "early in August" did you mean prior to the [218] election, or subsequent to the election?

A. Prior to the election, the first time.

Q. (By Mr. Roll): Prior to the election?

A. Yes, sir.

Q. Following the election did you contact any company official?

A. I wrote a letter to Mr. Peel of Salt Lake—I believe my letter was dated August fourteenth—requesting that—or stating that I represented his employees, and that I was interested in negotiating a contract.

Q. Following the election, which was held in September, did you then contact any company official? A. Yes, sir, I did.

Q. Who?

A. First I contacted Mr. Walker again.

Q. About when did you contact him?

A. Well, it was upon certification by the Board.

Q. Was anyone else present when you talked to him? A. No, I believe not.

(Testimony of Edward J. Mattox.)

Q. What was the substance of that conversation?

A. Oh, we had a short discussion, and he, of course, referred me again to Mr. Peel. I was somewhat confused as to whether he actually could negotiate or not, and preferring to do it on a local basis, why, I naturally contacted Mr. Walker, and he advised me that it would be necessary that I talk to Mr. Peel in the matter.

Q. (By Mr. Roll): And where did he tell you—or, did he tell you where you could contact Mr. Peel?

A. He did.

Q. Where? A. In Salt Lake.

Q. Did you contact Mr. Peel then?

A. Yes, sir, I did.

Trial Examiner Doyle: Well, now, just a minute.

Mr. Roll: Yes, sir.

Q. (By Trial Examiner Doyle): Was it following that that this letter was written?

A. I beg your pardon?

Q. Was it after that conversation that the letter was written to Peel?

A. No, sir.

Q. When you first started to tell us about this Mr. Roll asked a question, and you said that following the election you sent a letter to Peel.

A. Yes, sir.

Q. Well, I was just trying to put that in the place where it comes.

A. May I clarify it for you?

Q. Yes.

A. Originally, I—This was prior to the election,

(Testimony of Edward J. Mattox.)

your [220] Honor. In other words, I approached the employees, gained authorizations, and——

Q. (By Trial Examiner Doyle): All right. Well, I will start all over again. As far as I am concerned, let it go. You talked to Walker after the election?

A. Yes, sir.

Trial Examiner Doyle: Go on from there.

Q. (By Mr. Roll): Mr. Mattox, handing you General Counsel's Exhibits numbers Two and Three, I will ask you if you recognize those documents?

A. (Examining Exhibits) Yes, I do.

Q. Was General Counsel's Exhibit Two transmitted by you to Mr. Peel?

A. Yes. [221]

* * * * *

Trial Examiner Doyle: A letter from Peel November the eighth?

Mr. Roll: No, sir, the proposal transmitted by the Union to Mr. Peel apparently was sent November eighth, according to his letter to the Union, which is in the form of a counter-proposal, dated November sixteenth, Nineteen fifty. Is that so stipulated, counsel?

Mr. Callister: Yes.

Q. (By Mr. Roll): Inspecting those Exhibits, Mr. Mattox, to refresh your memory, will you indicate what in your original proposal was different than the existing conditions at the time you prepared the document? I am referring now to General Counsel's Two, the proposal that you made to the company.

(Testimony of Edward J. Mattox.)

A. Well, the wage rates are considerably different.

Q. Anything else different? Were they——

A. Well, yes, there's considerable——

Q. I am referring only to General Counsel's Two now, and not the counter-proposal by the company. May I see Number Three? Now, inspecting Number Two, which is your proposal to the company, I will ask you what sections of that in particular changed the working conditions or wages of the employees?

A. What portion of this changed?

Q. Yes. [222]

A. Practically all of it.

Q. (By Mr. Roll): In what respects?

A. Well, the vacations, and holidays, overtime, hourly rate.

Q. Now, in what way with respect to wages?

A. You mean the amount?

Q. Yes.

A. You mean what the company was paying, and what I asked for?

Q. Yes.

A. Some—Well, it's in different brackets. Our proposal——

Q. It provided for an increase, did it?

A. That's right, that is correct.

Q. What with respect to vacations?

A. Well, we—in our proposal I think we asked for one week after one year, and two weeks after three, and if I—or, two weeks after—Well, I will

(Testimony of Edward J. Mattox.)

have to look at the holidays here. I can't recall all of this.

Q. I think that's sufficient. What else, if anything, would change the working conditions of the employees?

A. What would change their conditions?

Q. Yes, in your proposal.

A. Well, their overtime, their holidays——

Q. Were you asking overtime, in excess of what the company was paying?

A. No, sir. In excess of—— [223]

Q. (By Mr. Roll): Yes, in excess of what the company was paying.

A. Oh, yes, definitely. It was my understanding that they weren't allowing overtime.

Q. Was there anything else in particular?

A. Well, naturally carries a lot of provisions and privileges that they didn't enjoy without organization.

Q. That's sufficient. Handing you now General Counsel's Exhibit Number Three, and contrasting that with General Counsel's Number Two, can you state briefly what concessions, if any, were made by the company?

A. The only concession that I could see was possibly the vacations.

Q. What was the company's position with respect to wage rates?

A. There was no offer.

Q. That's all for that. Following the receipt of that proposal by the company, General Counsel's

(Testimony of Edward J. Mattox.)

Exhibit Number Three, did you have a conversation with any company official?

A. Yes, on November the twenty-fourth I contacted Mr. Peel in Salt Lake.

Q. Where was that meeting?

A. In his office.

Q. Who else was present?

A. Mr. Harry Garrett. [224]

Q. (By Mr. Roll): Anyone else?

A. Just we three.

Q. Was that—About what time of day was that meeting? A. Oh, approximately nine o'clock.

Q. And about how long did it last?

A. Approximately an hour.

Q. Who acted as spokesman?

A. I did, more or less.

Q. For the union? A. That's correct.

Q. Was anyone with Mr. Peel to aid in the negotiations for the company?

A. No, sir.

Q. Did you make an advance appointment with Mr. Peel?

A. Yes, I called him on the phone.

Q. How long before?

A. I can't recall whether it was the same day, or the day before. My memory is hazy on that.

* * * * * [225]

Q. Very well. Now, will you relate, as best you can recall, the conversation you had with Mr. Peel, and any part that Mr. Garrett took.

A. Well, naturally, I opened with—after greet-

(Testimony of Edward J. Mattox.)

ings and salutations—I had never met Mr. Peel, and after introducing ourselves, why, I started the conversation rolling that I was there and prepared fully to——

Mr. Callister: Now, just state your conversation, please, Mr. Mattox.

A. That's my conversation.

Mr. Callister: Oh, I thought you said you were prepared fully, I thought that was—I am sorry. Go ahead.

A. That was my conversation with Mr. Peel, that I was fully prepared to talk contract with him with reference to his Idaho Falls store. He replied that he wasn't desirous of talking too much about the Idaho Falls operations; that he had negotiations coming up on his Salt Lake operations, and as a consequence he felt that he didn't want to do anything about Idaho Falls until such a time as he had completed negotiations in Idaho—or, Salt Lake, rather. With that I reminded him that it was my understanding that Salt Lake was some three or four months away from negotiations, and that [226] we had complied with his request with reference to an election; I was there, I represented his people, we were certified by the Board, and as a consequence the employees in Idaho Falls were desirous of some action with reference to a contract. He said he wasn't interested in that, that he was more interested in Salt Lake City. And then we discussed the thing further, and he did commit himself to say that he was desirous of complete uniformity in

(Testimony of Edward J. Mattox.)

the operation. He took issue with the pay scale, my proposal, and I told him, naturally, that was—Am I talking too fast?—I told him that that was the initial proposal, and I was there to talk any phase, word by word, paragraph by paragraph, or anything that he wanted to discuss pertaining to a contract. With that he reminded me again that he was desirous of uniformity, and my reply to that was we weren't too tough to get along with, that an interim agreement would satisfy us, if he was—if he was going to insist upon waiting until he could negotiate his Salt Lake agreement. And with that I took it as—I accepted as an offer that he would appear in Idaho Falls, in the very near future.

Q. (By Mr. Roll): Well, when you say you accepted it as an offer, what did he say?

A. He said that he was coming to Idaho Falls in the very near future, in fact, he would be up there in a week or so, and that he would stop and see me. And I didn't see him until yesterday. [227]

Q. (By Mr. Roll): Were any particular provisions of the proposal discussed? You mentioned wages, for one thing. State fully what was said concerning wages.

A. He said that our wages were excessive, that he couldn't meet it. I said, well, it was an initial contract, and we were—I was prepared to take back an offer—"If they are too high, make me an offer. Possibly they are too high, but, none the less, it's a proposal," and I asked him to take a position on it.

(Testimony of Edward J. Mattox.)

Q. And what was his reply?

A. He said he just—he couldn't talk wages.

Q. Was any other provision of the contract discussed?

A. Yes, I mentioned the fact that in Idaho it was customary, that is, at least in all of our contracts, that we had some form of Union security. He said he would grant no form of Union security, that that was a company policy.

Q. Was there any further discussion, now, that you can recall?

A. Yes, I did tell him I thought he was arbitrary and unfair on the matter; that he should give consideration, that this was a separate branch, and we were some two hundred and thirty-five miles distant from his Salt Lake office, and something should be done to reach an agreement.

Q. Were any other provisions of the contract discussed, that you recall? [228]

A. No, not to my knowledge, I can't recall. We discussed several things, and my memory is too hazy, it has been too far, or too long ago.

Q. (By Mr. Roll): Did you have the counter-proposal with you?

A. Beg your pardon?

Q. Did you have your proposal and the company's counter-proposal with you?

A. Yes, I did.

Q. Did you take those documents and discuss them paragraph by paragraph?

A. No, he wasn't—he showed no inclination to

(Testimony of Edward J. Mattox.)

do so. I wanted to, I told him that I would gladly go over it word for word.

Q. Now, when did you return to Idaho Falls, about?

A. Oh, shortly after that. It was within the next day or so.

Q. Were you contacted by Mr. Peel following that? A. No, sir.

Q. Did you have any conversation with Mr. Walker pertaining to the Union, or the contract, after you talked with Mr. Peel?

A. No. He had informed me that it was necessary to take it up with Peel, and so I accepted that.

Q. Did you call a strike at the Symms Grocer Company? A. Yes, sir, we did.

Q. Was there a meeting of the employees prior to the strike?

A. There was. [229]

Q. (By Mr. Roll): How long before?

A. The day before, on the fourteenth.

Q. Will you state in substance what that--what occurred at that meeting?

A. A majority of the employees attended; I had learned that Salt Lake had gone on strike, and was advised by Mr. Lott that if we were to ever get a meeting with Mr. Peel it would probably be necessary to strike.

Mr. Callister: Now, just a minute. We object to it on the ground it is hearsay, and ask you to strike it.

Trial Examiner Doyle: Strike it out.

(Testimony of Edward J. Mattox.)

Q. (By Mr. Roll): Just state what occurred at the meeting. A. At the meeting?

Q. Yes.

A. We held a meeting, discussed the matter, and took a strike vote. The vote was unanimous, and we struck.

Q. The date of the strike is established as March fifteenth, in the record, is that correct?

A. That's correct, to my knowledge.

Q. Did you see any company official on that day, or immediately thereafter?

A. No, except Mr. Walker as he came and went from the operation. I didn't converse with him.

Q. Do you know whether March fifteenth was pay-day? A. Yes, that was. [230]

Q. (By Mr. Roll): How do you know that?

A. Because the fellows asked that I go in and ask Mr. Walker for their checks.

Q. Did you?

A. I did this—I rather believe it was on the sixteenth that I asked for the checks, which was the following day after the strike.

Q. Who did you ask?

A. I asked Mr. Walker.

Q. And where was that?

A. In the office of the Symns Grocer company.

Q. And who was present?

A. Some employees. I can't recall just who they all were, but I do believe Mr. Carson and Mr. Ranson. I can't recall whether Ranson was there, but anyway it was some two or three of the employees.

(Testimony of Edward J. Mattox.)

Q. Mr. Carson, you are referring to Lyle Carson now? A. That's correct.

Q. Who has been referred to as a foreman?

A. That's right.

Q. Will you relate your conversation with Mr. Walker?

A. Yes; I asked Mr. Walker if the boys' checks had come in from Salt Lake, and he advised me that they had; and he said, however, there was one day that they were paid for, which was the fifteenth, the checks covered pay on the day of the fifteenth [231] which was not worked because they were on strike, and therefore it was necessary to return the checks to Salt Lake and re-process them, so that the company could make the deducts. He further advised that they had a six-cent increase on the checks. I didn't see the checks, so I couldn't state as to whether there actually was a raise, or not.

Q. (By Mr. Roll): Did you get the checks that day? A. No, sir.

Q. Was there any further discussion with Mr. Walker at that time?

A. Not too much. If there was, I can't recall, other than the purpose I was there for.

* * * * * [232]

Q. (By Mr. Roll): Following your conversation with Mr. Walker in the office on March sixteenth, when was the next time that you had occasion to contact any company official?

A. Will you state the question again, please?

(Testimony of Edward J. Mattox.)

Q. When was the next time you saw any company official, following your conversation with Mr. Walker on March sixteenth, as you recall.

A. On the sixteenth?

Q. Following that time? [236]

A. Well, it was on my next visit to Salt Lake. Well, it wasn't on my next visit; it happened to be that the last time I saw anyone was Mr. Peel at the April meeting in Salt Lake City.

Q. (By Mr. Roll): I see. Was that the meeting that was earlier testified to as being April nine?

A. That is correct.

Q. Nineteen fifty-one?

A. In the Industrial Relations Council.

Q. And it is already established in the record, I believe, where this conference occurred, and the time, and so on. Will you state who was present?

A. Well, the gentlemen, I believe, that's already been stated. As to the names, I can't recall all. Fuller Latter, a Mr. Johnson, I believe who was a Government Conciliator, and Mr. Lott—

Trial Examiner Doyle: We have all those names in the record here once.

Q. (By Mr. Roll): That's sufficient. Was Mr. Peel there? A. He was.

Q. Was Mr. Lott there?

A. He was.

Q. And were you there? A. I was.

Q. And Mr. Latter. [237] A. Yes, sir.

Q. (By Mr. Roll): You recall those?

A. Yes, sir.

(Testimony of Edward J. Mattox.)

Q. Will you relate what occurred, in so far as it pertained to Local nine eighty-three?

A. Well, it was a very brief meeting, very brief discussion, on their negotiations or contract covering the Symns Grocer operation in Salt Lake City. Mr. Peel and Mr. Latter had reached an agreement there, and it was signed, as I understand. And at the time, as I recall, Mr. Latter made a statement to Mr. Peel and his counsel there requesting the same consideration with reference to Idaho Falls.

Q. When you say the same consideration, what do you mean?

A. On the same basis. He asked if they wouldn't reconsider — asked Mr. Peel if he wouldn't reconsider, or his counsel, I believe it was he asked, if he wouldn't reconsider, and allow the same conditions in Idaho Falls as were gained in Salt Lake City, and he repeated it, so that it would be clear, and the answer was "No," by Mr. Peel.

Q. Who gave that answer? A. Mr. Peel.

Q. Did you hear any further conversation by Mr. Peel relating to nine eighty-three?

A. No, I didn't hear any. I had a little conversation with Mr. Peel. [238]

Q. (By Mr. Roll): Will you relate what that was?

A. Yes, sir; I asked him why he didn't see fit to reconsider and give us a little consideration in Idaho Falls, and he said that he definitely wouldn't reinstate the fellows on strike, and that he couldn't

(Testimony of Edward J. Mattox.)

settle, he didn't see fit to settle the Idaho Falls dispute on the same basis. However, that he would be up in a few days again, and we would discuss it further.

Q. Following that, did you return to Idaho Falls? A. Yes, sir, I did.

Q. Did you again contact Mr. Walker?

A. Yes; yes, I did.

Q. About when was that?

A. I was in the company of Mr Lott; that was shortly after the—I think it was in a day or two after the Salt Lake meeting, that is, this April ninth meeting, and we went there for the purpose of talking to the employees.

Q. What authority did you have to talk to the employees?

A. We had authority from Mr. Walker. Mr. Walker, I understand, had contacted Mr. Peel, and Mr. Peel had authorized us to go into the operation and talk to the strike breakers.

Q. Now, when did——

Mr. Callister: Now, just a minute. May we have that—strike that “strike breakers” stricken from the record? There is no evidence here that they are strike breakers. In [239] fact, they were just replacements.

* * * * * [240]

Trial Examiner Doyle: That's all, now, these people were employees and replacements there.

A. All right, I will say replacements, then. Call them what you may. I have my opinion.

(Testimony of Edward J. Mattox.)

Q. (By Mr. Roll): Did you have a conversation with Mr. Peel on April ninth concerning contacting the employees, if you recall?

A. I don't recall, I don't recall.

Q. All right.

A. I would rather think we didn't.

Q. Do you know what day, then, it was that you contacted Mr. Walker and the employees?

A. It was shortly after I returned, after the Utah meeting, after the April the ninth meeting. Some day or two. I can't recall just which.

Q. Did you get Mr. Walker's permission to talk to the men? A. Yes, sir.

Q. And did you talk to them? A. We did.

Q. Did you again talk to Mr. Walker, after you had talked to the men?

A. Yes; we talked to the employees in a box car out there—I believe they were unloading salt—and practically all the employees, that is, the warehouse employees were there, and one salesman. [241]

Q. (By Mr. Roll): Where did you talk to Mr. Walker, where was that conversation.

A. We talked to him at first, I believe, in the office, we went into his office, and then after our discussion with the employees Mr. Walker—after we were there a short time Mr. Walker came out and advised us that we were taking too much time, and that they had a lot of work to do.

Q. Your last conversation with Mr. Walker, then, was in the warehouse, was it? A. Yes, sir.

Q. Will you relate that conversation?

(Testimony of Edward J. Mattox.)

A. Well, Mr. Walker, as we were carrying on this conversation with the employees, approached us and said, "You fellows, I believe, have had enough time. We have got a lot of work here to do, and we got to get it done. So I wish you would terminate your conversation." Of course, he was addressing Mr. Lott at that time, and he and Mr. Lott got into a little heated conversation there, and—I am trying to recall exactly how it was said. I know the substance of the conversation. I think Mr. Lott—Mr. Lott did accuse him of hiring strike breakers, as he put it, and telling him that he had talked against the Union to the men, and as a consequence we couldn't influence them. We had offered them membership or jobs, or something; we were trying to reach a peaceful solution to the whole situation. And Walker replied that they wouldn't replace [242] these striking employees, and Mr. Lott—the conversation was terminated with the explanation by Mr. Lott to Mr. Walker to the effect that possibly there will be another answer to that, because we do have—we do have recourse, we have the Board, at least. And that's when we walked out.

Q. (By Mr. Roll): I believe you testified that Mr. Walker said he would not replace the striking employees? A. That's correct.

Q. Do you not mean reinstate, rather than replace? A. Reinstate.

Q. Was a request made to reinstate them?

A. Yes, sir.

Q. By whom? A. By Mr. Lott.

(Testimony of Edward J. Mattox.)

Q. And what was Mr. Walker's answer?

A. He said no, he wouldn't do it. * * * * *

Q. (By Mr. Roll): Mr. Mattox, why did you order a strike?

Mr. Callister: Well, now, just a minute. We object to [243] it on the ground it's incompetent, immaterial, irrelevant, and calling for a conclusion.

Trial Examiner Doyle: Overruled.

A. I may answer?

Trial Examiner Doyle: Yes.

A. For the very reason that we were unable to meet, we couldn't get a meeting with the employer to discuss negotiations.

Q. (By Mr. Roll): For a contract?

A. That's right.

Q. Did you maintain an office at Idaho Falls between the month of September, Nineteen fifty, through April, Nineteen fifty-one?

A. We did.

Q. Can you recall back what your longest absence was from the city of Idaho Falls during that period?

A. Well, never more than a weekend. I was always here through the business week, from Monday through Friday, and if I did stay away it was just over night.

Q. Did you take a vacation during that period,— A. No, sir.

Q. —or anything where you would have been absent for a week or two?

A. None, whatever.

(Testimony of Edward J. Mattox.)

Q. During that period did you ever receive communication from any company official seeking a meeting date for the purpose [244] of negotiating a contract? * * * * *

A. The answer is No.

Q. (By Mr. Roll): Specifically, did you receive any communication from Mr. Peel? A. No, sir.

Q. Or Mr. Walker? A. No, sir.

Q. Do you know where the business of Symns Grocer Company is located in Idaho Falls?

A. Yes, I do.

Q. Would you state the approximate distance between that building and your office? [245]

A. Approximately eight to ten city blocks.

Q. (By Mr. Roll): And I believe you have already testified the distance of Salt Lake?

A. Yes, sir, two hundred and thirty-five—some two hundred and thirty-five miles.

Q. By automobile? A. That's correct.

Q. You testified earlier, Mr. Mattox, concerning your conference with Mr. Peel in Salt Lake on November twenty-fourth, Nineteen fifty, and my recollection is that you testified to some matter concerning a wage increase discussed between you and Mr. Peel. Would you restate that again for clarification, so I can get it?

A. Yes. In asking Mr. Peel for a consideration regarding wages in the Idaho Falls area, compared to the Salt Lake area, in which we were notably higher, that is, in practically all of our brackets, that is, in all of our organized operations, I ac-

(Testimony of Edward J. Mattox.)

quainted him with the fact that we were confronted with a little different situation than they were in Salt Lake, due to the fact that we had the Atomic Energy operating in here, which were building these reactors in the desert, and it did have a tendency to elevate our pay scale somewhat, that our economy locally had been changed.

Q. What I had in mind—Did you make a specific wage demand? [246]

A. No, I was there for—I did make a—I did ask for a consideration beyond what the employees were being paid, but I made no specific demand as to the amount. I was there free to take back anything in the way of an offer.

Q. (By Mr. Roll): Then, the only specific demand that you made appears in General Counsel's Exhibit number two, the proposed contract which you submitted as a basis for the negotiations?

A. That's the only written, yes.

Q. Between that time and the month of April, Nineteen fifty-one, did any company representative seek to discuss a wage increase with you?

A. None, whatever. * * * * [247]

Redirect Examination

Q. (By Mr. Roll): Mr. Mattox, when you—at the time you called the strike on March fifteenth, do you know how long after before replacements began working?

A. The day after, after our strike started.

* * * * * [253]

(Testimony of Edward J. Mattox.)

Q. (By Mr. Roll): Was your picket line successful in preventing employees from working at the Idaho Falls Store?

A. No, it was not.

* * * * * [254]

Q. (By Mr. Roll): The Salt Lake settlement provided that the Symns Company's Salt Lake employees would return to work, is that right?

A. That is correct.

* * * * *

Trial Examiner Doyle: After the Symns settlement there wasn't any strike in Salt Lake City in the grocery industry, was there? That's what counsel is driving at.

Mr. Roll: That's right.

Mr. Callister: We will so stipulate there wasn't.

A. The answer is No, there wasn't a strike.

Trial Examiner Doyle: All right, we got it.

Q. (By Mr. Roll): What at the time, then, became the status of your strike at Idaho Falls?

A. Well, it just had to continue. It looked to us very much like the strike was lost. [255]

Q. (By Mr. Roll): Was that the point at which you sought reinstatement of the employees?

A. That is correct.

Q. Now, counsel asked questions concerning exchange of correspondence between yourself and Mr. Peel, and I wish to ask you, is it customary to negotiate by mail?

A. Not in—No, no.

Mr. Roll: That's all.

(Testimony of Edward J. Mattox.)

Recross Examination

* * * * *

Q. (By Mr. Callister): Now, Mr. Mattox, isn't it true that previous to this time you are referring to that you asked for [256] reinstatement, or Mr. Lott asked it from Mr. Walker, you had asked reinstatement before that time, hadn't you?

A. Yes; yes, we had.

Q. (By Mr. Callister): And, as a matter of fact, before the strike at Salt Lake City was closed you asked for reinstatement of the men on the picket-line, didn't you?

A. We asked for the same conditions.

Q. Yes, that's right. You asked for the same conditions as Salt Lake was requiring, or requesting?

A. That's correct.

Q. That's right. And that was before the Salt Lake City matter was disposed of?

A. That was the day that it was disposed of.

Mr. Callister: That's all.

Redirect Examination

Q. (By Mr. Roll): It was Mr. Peel's testimony, as I recall, that he came to the city of Idaho Falls shortly after the settlement of the Salt Lake strike on April ninth. I don't believe the exact date was fixed in the record. Did you at about April ninth, or subsequent thereto receive any call from Mr. Peel?

A. None, whatever.

Trial Examiner Doyle: Well, in connection with that, his testimony was he went over to the office

(Testimony of Edward J. Mattox.)

one time and found everything torn apart, and there was some remodeling, or something [256] of that sort in process.

Mr. Roll: Yes.

Q. (By Trial Examiner Doyle): At about that time were your offices remodeled, did you move, or anything of that sort?

A. The secretary was there.

Mr. Callister: Well, that wasn't the question.

Q. (By Trial Examiner Doyle): Well, was there some remodeling?

A. Oh, yes, definitely, but our officers were open.

Trial Examiner Doyle: Well, that's the point. Now, let's see about it.

Q. (By Mr. Roll): Was your office girl in the office during the remodeling period?

A. She was.

Q. Did she inform you that Mr. Peel had been in the office? A. No.

Mr. Roll: That's all.

Recross Examination

Q. (By Mr. Callister): Well, you weren't there on the day Mr. Peel refers to, were you?

A. It seems that I wasn't.

* * * * * [258]

Q. (By Mr. Callister): You testified, Mr. Mattox, that you had consulted with Mayor Sutton to contact Mr. Peel, is that right?

A. That's correct.

Q. Now, did the Mayor ever call you back as to

(Testimony of Edward J. Mattox.)

whether he [259] had contacted Mr. Peel, or not, or were there——

A. Yes, he did.

Q. (By Mr. Callister): What did he say?

A. Mr. Sutton called me and advised me that he had talked to Mr. Peel the day that I contacted the Mayor to see if we couldn't prevail upon him to use his influence with Mr. Peel, he knowing Mr. Peel, and I understood was a customer of Mr. Peel, and he had endeavored to reach him by telephone at Salt Lake.

Q. Well, just answer this——

A. Well, I am answering it.

Q. Well, sure. I am sorry. Go ahead.

A. And, naturally, he was unable to contact Mr. Peel that day. I believe that it was later on, at least a day or so later, that Mr. Sutton called me, and advised me that Mr. Peel would be up, told him that he would be up.

Q. Now, did you have another conversation with the Mayor subsequent to that time?

A. I don't recall whether I did, or not. I can't say. * * * * * [260]

Redirect Examination

Q. (By Mr. Roll): Mr. Mattox, why did you go to the Mayor?

A. To see if he couldn't effect a meeting with Mr. Peel of the Symns Grocery Company.

Q. Now, I would like to ask you about your office practice. When you found it necessary to leave

(Testimony of Edward J. Mattox.)

the office did the office know how to get in touch with you?

A. Always.

Q. What procedure did you follow?

A. I told the girl.

Mr. Roll: That's all.

Mr. Callister: That's all.

Q. (By Trial Examiner Doyle): Mr. Mattox, I am interested in one point in this situation here. You told us that you went down to see the employees who were then employed by the company [263] while the strike was in progress?

A. Yes. * * * * *

Q. Now, there came a time when you went down and talked to these replacements, isn't that true?

A. Yes, sir. [264]

Q. (By Trial Examiner Doyle): Now, when was that?

A. That was after I had returned from the April ninth meeting, in which a contract was effected in the Salt Lake operations.

Q. (By Trial Examiner Doyle): Okay. Now we know what time we are both talking about. How long after the April ninth meeting was it you went over there?

A. Just a day or two after; that would be April the tenth or eleventh.

Q. Now, the men who were then employed on the job were not members of your Union, were they?

A. That is correct.

Q. And you at that time were proposing to the

(Testimony of Edward J. Mattox.)

company that they be discharged and the strikers reinstated to their positions, isn't that correct?

A. No, that isn't correct. We went there to offer them membership, or a solution to the thing. We wanted to settle the strike.

Q. That's what I am getting at. Now, would you tell me what you said to these men?

A. Yes sir; what we said to those men, we offered them, first of all, Union membership; we asked that they reconsider their position in reference to the strike, that the men who were on strike were honest, red-blooded American citizens, and they were taking their jobs; that we had jobs that we [265] could offer them, or we could offer them membership, as we were still desirous of keeping organization alive within that operation; we offered to send them to the desert at high paying jobs, and they declined that, and we sent out people who were on strike on these jobs.

Q. (By Trial Examiner Doyle): Now, when you—before you had the conversation with the men, I think you said you talked to Mr. Walker?

A. That's correct.

Q. To get permission to talk to them?

A. Right.

Q. Now, before that had you had any talk with any Union official, or with anybody from the company, along the lines or substance that if there was some way to get those men out of the job the strikers could be reinstated?

A. That's right.

Q. Did you have some such talk?

(Testimony of Edward J. Mattox.)

A. I had had a talk with Mr. Lott, who was my boss at the time, and, in fact, he accompanied me on this.

Q. What I am getting at is you knew, did you not that the situation had been solved in Salt Lake by having the men join the Union,——

A. Yes sir.

Q. ——and get out of the job so the strikers could go back? A. Yes sir. [266]

Q. (By Trial Examiner Doyle): Were you trying to do the same thing over here?

A. Yes sir, we even went farther than Salt Lake. We offered to let them remain on the job, because we had good jobs to offer our people who were on strike. And we wanted to organize the place, and we offered them Union membership.

* * * * *

Q. (By Trial Examiner Doyle): Can you give me any reason, or explanation of why, as far as I understand it, you made no further effort to contact Mr. Peel between November twenty-four and April nine?

A. Yes, your Honor; I was an employee of Local eight ninety-three, and not an officer; I worked under directions, and that was Mr. Lott, his end of the business. In other words, that was left solely up to him, more or less, in this particular case, because he had occasion to go to Salt Lake, where I didn't, and in these contacts with Mr. Peel by phone, why, then he handled that end of it.

* * * * * [267]

(Testimony of Edward J. Mattox.)

Recross Examination

Q. (By Mr. Callister): Mr. Lott doesn't negotiate all your contracts in Idaho Falls, does he?

A. No sir.

Q. You do yourself, don't you?

A. Occasionally.

Q. Or, did at that time?

A. Occasionally I do, and I am usually assisted by Mr. Lott.

Q. Yes. But my point is your primary duties are to negotiate and take care of the contracts in the Idaho Falls area, isn't that right?

A. Customarily Mr. Lott attends all the negotiations,—

Q. Well, my point is—

A. —in practically all our contracts, he is signatory to them.

Q. That's right. But you are the one charged with the duty of taking care of the business in Idaho Falls, aren't you?

A. That's right.

Q. The same as he does in Pocatello?

A. Well, he is over the territory; he is an **officer** in the [268] Union, and I work under direction.

Q. (By Mr. Callister): Your title is Business Representative, isn't it?

A. That's right. Ninety-nine percent of our contracts he signs. I may lay some ground work in the negotiations, but he is usually the final word.

Mr. Callister: That's all.

(Testimony of Edward J. Mattox.)

Redirect Examination

Q. (By Mr. Roll): The contracts that you have negotiated, and those that you have signed, where did those negotiations take place?

A. At the company's place of business.

Q. In what city?

Trial Examiner Doyle: Well, counsel, are you maintaining that it has to be at the place of business here at Idaho Falls? What difference does it make?

Mr. Roll: I think my next question will clarify it.

Mr. Callister: I think it's immaterial.

Trial Examiner Doyle: I will let counsel ask the question.

Q. (By Mr. Roll): Have you ever gone to Salt Lake to negotiate and sign a contract, other than your call upon Mr. Peel on November the twenty-fourth?

A. No sir.

Mr. Roll: That's all. * * * * * [269]

CLARENCE P. LOTT

a witness recalled by and on behalf of the General Counsel, was further examined, and testified as follows:

Witness: Is it necessary to be sworn?

Trial Examiner Doyle: No, you are under the previous oath administered.

Direct Examination

Q. (By Mr. Roll): Were you present—I believe you testified that you were present, Mr. Lott, at the meeting with the employees to which Mr. Mattox

(Testimony of Clarence P. Lott.)

just testified, following the April ninth, nineteen fifty-one meeting in Salt Lake, when you visited the employees? A. That's correct.

Q. Was it you or was it Mr. Mattox that asked the company to reinstate the employees? [273]

A. It was myself.

Q. (By Mr. Roll): Will you state why you made that request?

Mr. Callister: Well, we object to it on the ground it's immaterial, incompetent and irrelevant, and calls for a conclusion, and it's hearsay as far as—Not hearsay. Pardon me.

Trial Examiner Doyle: I will overrule the objection. His purpose in making the request, I think it's germane here.

A. The purpose of making the request, we realized that the strike was broken, and that the company was operating with employees behind the picket-line, and that we desired to get the people back into the operation, that was out on strike.

Q. (By Mr. Roll): Will you state, as nearly as you can, your words to Mr. Walker when you made the request?

A. I asked Mr. Walker if he would reinstate the employees, and he said, "Never," and I——

Mr. Roll: That's sufficient. That's all.

Cross Examination

Q. (By Mr. Callister): Well, Mr. Lott, you were in Salt Lake at the April the ninth meeting? You were, were you not? A. Yes.

(Testimony of Clarence P. Lott.)

Q. And didn't you hear Mr. Peel say that he would put the strikers back as fast as openings occurred? A. He did not. * * * * * [274]

Q. (By Trial Examiner Doyle): You were going to say that you heard something. What was that, Mr. Lott?

A. When Mr. Latter asked Mr. Peel about settling the Idaho Falls situation, he said, "I am not interested in settling Idaho Falls. We are getting along, and we are happy, and we are operating without any difficulties, at all, in the Idaho Falls district."

Q. Did you hear Mr. Peel say this, or this in substance, at any time, that he did not desire to settle the strike if it entailed the discharge of men at Idaho Falls, and the reinstatement of the strikers?

A. I think Mr. Peel made the statement that he would not discharge any of the employees that he had hired at Idaho Falls, that they were doing a good job, and he was happy with their work.

* * * * * [275]

Q. (By Trial Examiner Doyle): Was there any time that Mr. Peel said, in substance, that he was agreeable to settling the Idaho Falls strike on the basis of the settlement at Salt Lake City, if it did not entail the discharge of the men at Idaho Falls and their replacement by the strikers?

A. I can't ever recall of Mr. Peel ever making such a statement. He took the same position as on the twenty-seventh meeting, and I had——

(Testimony of Clarence P. Lott.)

Q. Did Mr. Peel—Let me put it this way——

A. Mr. Examiner, may I clarify?

Q. Yes.

A. I was in the same position in the April ninth meeting as I was on the April (sic) twenty-seventh, that the Conciliation Service was taking the position that I had no right there. So that the questions was asked by Fullmer Latter about the settlement of the strike, and the answers that he got from Mr. Latter (sic) was the fact that he was happy with the Idaho Falls situation, and he would not. And at that time, as the record will bear out, we had already filed Refusal to Bargain, because of the action that was taken in the twenty-seventh meeting by refusing to let us set in on a meeting that was called, and even discussing our problem, at all. There was no offers by the company to meet with us separately; they objected to us sitting in jointly; the Council, the Industrial Council or Mr. Peel made no offer to discuss the issues with [276] us; we were told that we were outsiders, and we had no authority whatsoever, and that I could not voice an opinion, and I could sit there as a spectator only.

Trial Examiner Doyle: All right. Any further questions, gentlemen?

Q. (By Mr. Roll): I would like to clarify a couple of things that you just told the Examiner, Mr. Lott, where I think you may have inadvertently erred——

Trial Examiner Doyle: Well, just a minute——

Mr. Roll: It relates to the date in Salt Lake, Mr.

(Testimony of Clarence P. Lott.)

Examiner, as being April twenty-seventh, instead of March twenty-seventh.

Trial Examiner Doyle: I will withdraw my remark.

A. That was an error in dates.

Q. (By Mr. Roll): Also, I believe you testified that Mr. Latter, instead of Mr. Peel, made the statement concerning the Idaho store.

A. Mr. Latter made the request, asked Mr. Peel if he would make a settlement at Idaho Falls.

* * * * * [277]

Mr. Roll: It is hereby stipulated and agreed by and among [279] the parties hereto, that on or about June thirtieth, Nineteen fifty—or, Nineteen fifty-one, an oral agreement for the sale of the Idaho store, the Idaho Falls store——

Mr. Callister: No, may I just say—and the bill of sale recites it, Mr. Roll—all we sold was all merchandise, fixtures and equipment.

Mr. Roll: ——by Respondent, Symns, to a corporation subsequently formed, known as Idaho Wholesale Grocery Company, the negotiations for the sale having preceded the actual agreement by about sixty days.

Mr. Robert Peel: You said the negotiations had preceded?

Mr. Roll: Yes.

Mr. Robert Peel: Yes, about sixty days.

Mr. Roll: And the actual agreement or bill of sale having been signed July twenty-five, Nineteen fifty-one, transferring merchandise and equipment in

the following particulars: All merchandise, fixtures and equipment located at Idaho Falls, Idaho, as of the seventh day of July, Nineteen fifty-one.

Additionally, General Counsel proposes the stipulation to contain the fact that the same manager, Mr. Walker, continued under the new owner, Idaho Wholesale Grocery Company, as manager for a period of about—until about January one, Nineteen fifty-two; and that the same employees who were employed by Symns Grocer Company at the time of sale continued as employees of the purchaser; and that the business, customers, [280] and method of operation continued in substance as it had prior thereto under the Seller, Symns Grocer Company.

Does counsel so stipulate?

Mr. Callister: With this addition, that the—as I understand it, the name of the company was changed to Idaho Wholesale Grocery Company, and with that condition we so stipulate that it is correct.

Trial Examiner Doyle: It is so stipulated?

Mr. Roll: It is so stipulated.

Would counsel also stipulate that the same accounts, same customers, and in general the same business was continued as existed under Symn Grocer Company?

* * * * *

Mr. Roll: Specifically, that they, the new company, continued with the same customers as the old, together with any new customers that could be obtained, and, of course, a consequent loss of whatever customers that decided to withdraw their business.

Mr. Callister: So the record will be further clear,

the [281] Idaho Wholesale Grocery—I think you allege it, but I want to make sure—it was a bona fide sale, and was a wholly owned subsidiary of the Utah Wholesale Grocery Company, a competitor.

Mr. Roll: The General Counsel is willing to accept the latter as part of the stipulation.

Trial Examiner Doyle: All right. That clears up that point, that was somewhat in the back of my mind, too.

All right, if you have nothing further, you can go ahead with the testimony.

Mr. Roll: I anticipate the question the Examiner may have had, and possibly this will clarify it, that it is not the General Counsel's contention that the sale was made for the purpose of evading any liability on the part of respondent Symns, and I expect to introduce some proof.

Mr. Callister: So the record will further show, the liabilities and accounts receivable were not sold to the Idaho company. Is that right, Mr. Peel?

Mr. Robert Peel: Yes.

Mr. Callister: In other words, when you say assets you refer to merchandise, stocks and fixtures. But, the accounts receivable and the liabilities of the company were not assumed or purchased.

Trial Examiner Doyle: However, it is General Counsel's position that one liability was imposed by law on the new company? [282]

Mr. Roll: I wish to make clear that for other than this liability General Counsel is without knowledge, but at least we will urge that this liability was a continuing one.

Trial Examiner Doyle: All right.

Mr. Roll: Mr. Ranson, will you please take the witness stand?

HARRIS RANSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Trial Examiner Doyle): Will you please state your full name, and residence?

A. Harris Ranson, Two twenty-five, Oneida Avenue, Idaho Falls.

Q. What is your occupation, Mr. Ranson?

A. Truck driver.

Q. Have you at any time been in the employ of Symns Grocer Co.? A. Yes.

Q. Do you remember the approximate date when you began work?

A. It was in February of Fifty.

Q. That was for Symns? A. Uh huh.

Q. And how long did your employment continue?

A. Until the fifteenth of March in Firty-one.

Q. (By Mr. Roll): Did you——

A. I made an error.

Q. Yes?

A. I started to work for Symns in February of Forty-eight.

Q. February, Forty-eight?

A. That's right.

Q. And you worked until March fifteen, of Nineteen fifty-one? A. Yes, sir.

(Testimony of Harris Ranson.)

Q. When you first applied for employment to whom did you make application?

A. Wallace McEntire.

Q. And what was his position?

A. He was manager of the Symns store in Idaho Falls.

Q. Was he the only person that you interviewed prior to being hired? A. Yes.

Q. Was there an individual known as a foreman at that time? A. There was.

Q. Did you interview him prior to going to work? A. No.

Q. What was his name? A. Kay Wright.

Q. Was he subsequently replaced as foreman by someone else? A. Yes. [284]

Q. (By Mr. Roll): And by whom?

A. Lyle Carson.

Q. At the time you began work was there a union among the company's employees?

A. No.

Q. Was there any attempt made to form a union among the employees during the period of your employment? A. Yes, there was.

Q. Were there more than one instance—was there more than one instance? A. Yes.

Q. When was the first attempt?

A. It was in Forty-eight.

Q. Nineteen forty-eight? A. Yes.

Q. What union, do you recall?

A. It was the Teamsters Local, in Idaho Falls here. * * * * * [285]

(Testimony of Harris Ranson.)

Q. (By Mr. Roll): The next organizational attempt was in August, Nineteen fifty?

A. Yes.

Q. Did you participate in that?

A. Yes, I did.

Q. Did you sign an authorization card in the Union? A. Yes.

Q. Did you discuss that matter with any company official? A. With Mr. Walker, I did.

Q. Who was Mr. Walker?

A. Mr. Emmett Walker. He was manager at the warehouse.

Q. Did he replace the former manager that you have testified to? A. Yes.

Q. When did you have the first discussion with Mr. Walker?

A. Well, sir, it was October the fourth.

Q. The record now shows that there were two elections in the month of September, Nineteen fifty, and your conversation with [289] Mr. Walker was subsequent to the election, is that right? That is, it followed the election, was later?

A. It was later than the election.

Q. (By Mr. Roll): How can you fix the date?

A. Well, I had been to Blackfoot on my deliveries, and I——

Q. That's all right. Where did the conversation take place?

A. On the dock, at the warehouse.

Q. Who was present?

A. I and Mr. Walker.

(Testimony of Harris Ranson.)

Q. No one else? A. No.

Q. About what time of day was it?

A. Oh, I think it was around one-thirty or two o'clock.

Q. Will you relate that discussion?

A. Well, as I come up on the dock, Mr. Walker came out of the warehouse, and he asked me what I thought about the Union, and I told him I thought it was a good thing, that it would help us boys, that we would have better working conditions; and he told me that Mr. Peel would never grant the Union Shop there at the warehouse.

Q. Do you recall anything else at that time?

A. No, I think that's about the size of it.

Q. Did you engage in a strike? A. Yes.

Q. Was that strike about March fifteenth, Nineteen fifty-one? [290]

A. Yes, that's when it started, March fifteenth.

Q. (By Mr. Roll): Did you—when did you decide to strike?

A. Well, on the night of the fourteenth we had a meeting.

Q. Why did you strike?

A. Well, the way I understand it, we couldn't get anyone to bargain with us for a contract, so's that we could go on to work.

Q. Was that discussed at the meeting prior to voting to strike? A. Well, yes.

Q. Who told you that? A. Mr. Mattox.

Q. Did you discuss that matter with any company official? A. No.

(Testimony of Harris Ranson.)

Q. And my "that matter" I am referring to why you were on strike.

A. Well, no, I never, but Mr. Mattox had tried, and he told us he had.

Q. That's fine. What day was pay day?

A. The fifteenth and the first.

Q. Pay day, then, was the same day that you went on strike? A. Yes, sir.

Q. Did you get your check that day?

A. No.

Q. Did you try to get your check? [291]

A. We went—on the sixteenth we went in after our checks.

Q. (By Mr. Roll): Now, who all went in?

A. There was I, and Lyle Carson, and Mr. Mattox, and one——

Q. To whom did you talk?

A. I talked to Mr. Walker.

Q. Was there anyone else present, other than those individuals and Mr. Walker?

A. Well, there was the office girls.

Q. How many girls are there in the office?

A. They had two at that time.

Q. Will you relate the conversation as nearly as you can recall it?

A. Well, we asked for our checks, and Mr. Walker told us that he had sent them back to Salt Lake to have them altered; and he told us that—he figured with a pencil and paper there for a while, and he told us that if we had stayed we would have got a raise, that our wages would have

(Testimony of Harris Ranson.)

been a dollar twenty-three for the warehousemen.

Q. Did he tell you when that increase took effect? A. No, he didn't say at the time.

* * * * * [292]

Q. (By Mr. Roll): Will you give in detail all of the conversation that you can recall with Mr. Walker at that time, and try and use, as nearly as you can, the words that were used in the office between yourselves?

A. Well, as near as I understood him, our raise was on the checks. That was my understanding with Mr. Walker at that time.

* * * * * [293]

Q. Do you know Lyle Carson?

A. Yes, sir.

Q. Do you know what his title was?

A. Yes, foreman.

Q. What was it? A. Foreman.

Q. During the time that Lyle was foreman have you had occasion to take a vacation?

A. Yes, sir.

Q. Who did you ask for your vacation?

A. Mr. Walker.

Q. Did you consult with Carson? A. No.

* * * * * [294]

Q. Have you received instruction from Carson, during the course of your employment?

A. As to what?

Q. What to do, and what not to do?

A. Yes, he has told me at times to do certain things, but he has been told to tell me.

(Testimony of Harris Ranson.)

Q. Been told to tell you? A. Yes.

Q. Would you explain that, please?

A. Well, around the warehouse there we would have our orders to put up, and groceries to stack, and keep the warehouse in shape, and if there was changes to be made, well, Mr. Walker would want something put in one place, well, he would tell Lyle to tell the boys to move them.

Q. Now, have you heard Mr. Walker tell Lyle to tell the men to do something?

A. Yes, I have.

* * * * * [302]

Q. (By Mr. Roll): Will you state the method in which you—the words, if you can—did Carson use any unusual words, that you remember, in giving orders?

A. The only thing that he told us was that Walker told us to do this.

Q. Have you received direct orders from Mr. Walker? A. Yes.

Q. Have you received them at a time when Carson was present? A. Yes, sir.

Q. Have you received orders from Carson at a time when Mr. Walker was present?

A. Yes.

* * * * *

Q. (By Mr. Roll): What was your job?

A. I worked in the warehouse, and drove the delivery truck. [303]

Q. (By Mr. Roll): Now, when you drove a delivery truck, tell us just what sort of—the entire

(Testimony of Harris Ranson.)

job description of what you did in driving the truck.

A. Well, we put the orders up, and I would back up to the dock and load them in the truck, in rotation, so I would know how to get them out when I had to stop, and I would deliver around to the stores throughout the country.

* * * * *

Q. (By Mr. Roll): Will you explain how the orders were put up?

A. Yes, we had hand trucks; and we would take our invoice and go around the warehouse, and put our orders up, one at a time, and wheel them out on the dock.

* * * * * [304]

Q. (By Mr. Roll): Who told you to fill orders, if anyone? A. No one.

Q. Who supervised you in filling an order?

A. Nobody.

* * * * * [305]

Q. (By Trial Examiner Doyle): You say you worked there for quite a number of years, is that right? A. Yes, about three years.

Q. Did you ever hear Mr. Walker tell you, or any other employee, that Mr. Carson was the foreman? A. No.

Q. You knew, or you understood, did you not, that Carson was your boss, to some extent?

A. Yes, I did.

Q. How did you know that he was your boss to some extent?

(Testimony of Harris Ranson.)

(No answer.)

Q. How did you know it?

A. He took Kay Wright's place when he left.

Q. He took Kay Wright's place?

A. Yes.

Q. Did you know Kay Wright was the foreman?

A. That's what they told me.

Q. Now, there is nothing mysterious about this. All we want to know is what this man Carson did, and what you did. Do you [306] understand me?

A. He did the same work I did.

Q. (By Trial Examiner Doyle): All right. Now, then, did he give you any orders to as where to go to make deliveries? A. No.

Q. Did he have anything to say to you when you came back from making deliveries?

A. He never.

Q. If you were late when you came home did he wait there and ask you where you had been?

A. No.

Q. Did he at any time check on you as to where you had been with your deliveries?

A. No, he never.

Q. What made you think, then, that he was your boss?

A. As I told you, that he took Kay Wright's place.

* * * * * [307]

Q. (By Mr. Roll): Who told you, if anyone, to turn the orders into the office after—the slips into the office after the order had been filled?

(Testimony of Harris Ranson.)

A. Well, I think Wallace McEntire told me the first time.

Q. And who was Mr. McEntire?

A. He was the manager when I first went to work for Symns.

Q. After you turned the slip into the office, *when* what did you do?

A. Go back to the warehouse, pick up another order and go to work.

Q. Now, when—what would—what did Mr. Carson do, what did his duties entail while you were doing this work you have just described?

A. He was putting up orders, the same as me.

Q. (By Trial Examiner Doyle): Did he take them out in the truck, too?

A. He didn't take the truck out, no; he would wheel them out onto the dock.

Q. Were you the only one that delivered by truck? A. No, we had two trucks.

Q. Who drove the other one?

A. Charley Graves. [308]

Q. (By Trial Examiner Doyle): Did Carson stay in the place all the time? A. Yes.

Q. Did he have a little office there?

A. You can call it an office if you wanted to. I wouldn't.

Q. All right. Did he have a little room which was his own?

A. Yes. It wasn't his own, it was—all of us used it.

Q. Was there a desk in there?

(Testimony of Harris Ranson.)

A. We had a desk in there, or a slope-top table.

Q. When you say "we," you mean all of you had a desk in there?

A. It was one desk, and we all used it.

Q. Now, who else was working there, besides the other driver—that you have just mentioned?

A. Don Forbush, and Reed Ritchie, Charley Graves, myself, and Lyle Carson.

Q. Now, did any of the other men drive the truck and make deliveries?

A. At times they would. Not too often. They usually had a regular driver, because he would know where he wanted to go.

Q. Where was this office located?

A. It was attached onto the main office of the—in the warehouse.

Q. Where was Mr. Walker's usual place of business? Did he have an office? [309]

A. Yes.

Q. (By Trial Examiner Doyle): Where was his office? A. It was——

Q. Was his office some other place than where this Carson's and your office was?

A. It was in the same room, other than it was partitioned off.

Trial Examiner Doyle: All right. Continue.

Q. (By Mr. Roll): When you filled the orders, Mr. Ranson, how did you know when to take them out in the truck?

A. Well, when I first went to work there they told me how to do it.

(Testimony of Harris Ranson.)

Q. Who told you how to do it?

A. Mr. Walker—or, Mr. McEntire.

Q. And what did he tell you?

A. He would tell me, after I got my orders put up for the deliveries, to load them and take them.

Q. Did you load in any set fashion?

A. Well, I would keep my orders separated, so I wouldn't have trouble unloading them.

Q. Were your orders inspected prior to your taking them out in the truck?

A. We checked our own orders when we put them out on the dock.

Q. What would checking an order constitute?

A. Well, we would take our invoice in our hands, and stand by our order that we had put up, and read off from the invoice and check our cases to that effect, to make sure they was right.

Q. (By Mr. Roll): Did you always check your own orders? A. Not always.

Q. Or did other people check them?

A. We might check one another's orders, or check our own. It depended on how the time allowed.

Q. How did you know whose order to check?

A. Well, if any order had been checked the invoice would be turned back into the office.

Q. Then how would you know what order to check next?

A. Well, we had our invoices out, and the invoices that were out we knew the order hadn't been checked.

(Testimony of Harris Ranson.)

Q. Did Mr. Carson check orders? A. Yes.

Q. Well, were you instructed by anyone what order you should check? Suppose there were two or three orders, how would you know which one to check first?

A. Well, that wouldn't make—that didn't make any difference; we would check the one first we wanted to.

Q. Who assigned the truck that you drove, who assigned that to you? A. Mr. McEntire.

Q. (By Mr. Roll): Did anyone ever assign you to another truck? A. No.

Q. Did you change trucks?

A. Yes, I have changed trucks.

Q. How did you know when to change trucks?

A. When the one I was driving would be broke down, or having a tire fixed on it, or something.

Q. Well, did you—how did you know what truck to take then?

A. Well, we only had two trucks, and there was nothing else to do, if one was broke down, but take the other one.

Q. Did Mr. Carson ever assign you to a truck?

A. No.

Q. How did you know what goods to deliver first?

A. Well, we would deliver the ones first that we come to first; the store closest to us was the first order we would deliver.

Q. Now, who told you to do it that way?

A. Nobody.

(Testimony of Harris Ranson.)

Q. Did you ever have an accident in your truck? A. No.

Q. Did your truck ever get out of repair?

A. Oh, yes.

Q. Who did you report that to?

A. Mr. Walker, or Mr. McEntire when he was manager. [312]

Q. (By Mr. Roll): Have you had occasion to make purchases in the name of the company?

A. Yes.

Q. With company funds? A. Yes.

Q. Who would tell you to do that?

A. Mr. Walker.

Q. Will you tell us what supervision, actual supervision or direction Mr. Carson exercised over you?

A. Well, I would say he was more or less a lead-man.

Q. Well, by that, now, what did he do?

A. He would get his orders from Mr. Walker, and he would give them to me.

Q. Now, what sort of orders would he give to you from Mr. Walker?

A. Well, like I say, if they wanted to stack soup, well, he would come and tell me.

Q. Before you stacked goods did you wait for instructions to stack?

A. Not always, no. If I see something that needed done, well, I would go ahead and do it.

Q. After leaving, after going on strike March fifteen, did you personally make application to the

(Testimony of Harris Ranson.)

company for employment? A. No, I didn't.

Q. (By Mr. Roll): Did any of the company officials ask you to come back to work?

A. No.

Q. Do you know whether anyone made an application for your return to work?

A. Mr. Mattox told us that he had.

Q. Did you authorize Mr. Mattox to make such a request? A. Yes.

Mr. Roll: That's all.

Trial Examiner Doyle: Cross examine.

Cross Examination

Q. (By Mr. Callister): Mr. Ranson, I think you said you held a meeting on the fourteenth of March, the night before you went out on strike, that's correct, is it not?

A. Yes.

Q. And at that meeting, I assume, you were told by Mr. Mattox or Mr. Lott that the Salt Lake plant of Symns had gone out on strike that day, weren't you? A. Yes.

Q. And that was one of the reasons why you were going out the next morning?

A. Yes, sir.

Q. That's right. Now, Mr. Ranson, I think you said Mr. Carson took Mr. Kay Wright's place, is that right? Is that the gentleman's name? Who was the predecessor? [314]

A. That's right, Kay Wright.

Q. (By Mr. Callister): And when you came to

(Testimony of Harris Ranson.)

work Mr. Kay Wright was designated as the foreman, wasn't he? A. Yes.

Q. And he was the gentleman who told you what to be done when Mr. Walker wanted something done, is that right?

A. Well, Mr. Waker wasn't manager then.

Q. Well, Mr. McEntire?

A. Well, Mr. McEntire——

Q. Is that correct?

A. Yes, that's right, he would tell us what to do.

Q. That's right. In other words, Mr. Wright would get his instructions from Mr. McEntire, and then Mr. Wright would come out and tell you fellows when and how and where to do it, is that correct? A. Yes.

Q. And lots of times Mr. McEntire was not always there, was he?

A. Mr. McEntire was there nearly all the time.

Q. Well, Mr. Walker hasn't always been there?

A. No.

Q. He was their salesman in addition to a manager, wasn't he? A. That's right.

Q. Now, as I understand it, Mr. Carson, when Mr. Wright [315] left, took Mr. Wright's place as foreman, did he?

A. Yes.

Q. (By Mr. Callister): And did the same things Mr. Wright had been previously doing?

A. Yes.

Q. Isn't that right? A. That's right.

* * * * *

(Testimony of Harris Ranson.)

Mr. Roll: Will Lyle Carson take the stand, please?

LYLE CARSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined, and testified as follows:

Direct Examination

Q. (By Trial Examiner Doyle): Please state your full name and address.

A. Lyle Carson; Twelve eighty-five, Bannock Avenue.

Mr. Roll: If you will, Lyle, talk louder, so we can all hear.

Q. (By Mr. Roll): What is your occupation?

A. Well, I would say truck driver and warehouseman.

Q. How long have you been engaged in that type of work, Mr. [316] Carson?

A. Some of it there I have been in it there nearly fourteen years.

Q. (By Mr. Roll): Have you ever been in the employ of Symns Grocer Company?

A. Yes, sir.

Q. Do you remember about when you went to work?—for that company.

A. I am not specific about the year, but I think it's August the twelfth, Nineteen forty-nine.

Q. Nineteen forty-nine?

(Testimony of Lyle Carson.)

A. I believe that's correct, yes, sir. Or, not Nineteen forty-nine. Nineteen forty-eight.

Q. Nineteen forty-eight? A. Yes, sir.

Q. To whom did you apply when you secured employment there?

A. Wallace McEntire, the manager.

Q. Did you talk to anyone else about the job before you were hired? A. No, sir.

Q. Was there a person designated as foreman at the time you went to work?

A. That was my understanding, Kay Wright was foreman.

Q. Who told you that?

A. Mr. Walker—or, McEntire. [317]

Q. (By Mr. Roll): And when did you—Or, did you later assume the title of foreman?

A. That's what they gave me, but I couldn't say that I was a foreman.

Q. Well, when did that occur, Mr. Carson?

A. Well, I can't—I can't give you no answer on that, at all; I don't know.

Q. Did you replace the former foreman——

A. I did.

Q. ——when he left? A. Uh huh.

Q. Do you remember what year it was?

A. It was in Forty-nine.

Q. Forty-nine?

A. And I believe the first part of the year.

Q. How did that come about? Will you explain that to us?

A. Mr. Wright went on the road as a salesman,

(Testimony of Lyle Carson.)

and of course they had to have somebody in there in his place, and they asked Charley Graves if he wanted it, and he refused, and he recommended me. And I didn't want the position, or the job—I will say it was a job—I didn't want the job, and I told McEntire that I couldn't do it, but he more or less insisted that I give it a try, and he said he would help me all he could, and the boys out in the warehouse would help me all they could. So, I told him that I would try it, and try to get [318] along with the boys out in the warehouse.

Q. (By Mr. Roll): Now, what about the job was there that you had some hesitancy about?

A. About giving orders, and things of that—like that. I am not a man of that kind.

Q. Was there any part of the job that you had a question as to whether you were able to perform it?

A. The only job that I figured I was capable of was working in the warehouse.

Q. Did you discuss with the manager at that time, Mr. McEntire, the scope of your authority as foreman?

A. Well, there was nothing said, as far as I can remember about my—what I was to do out in the warehouse, that is, in the line of ordering the men, or anything of that sort.

Q. Did you talk about it, at all?

A. No, not that I can remember.

Q. Well, were you told what you could do, and what you couldn't do? A. No.

(Testimony of Lyle Carson.)

Q. Were you told what you were supposed to do?

A. No, sir. I just took it for granted that I was just another employee in the warehouse.

Q. What rate of pay were you receiving before you assumed the title of foreman?

A. A dollar and ten cents an hour, I believe.

Q. (By Mr. Roll): Did this amount to a wage increase for you?

A. This other position, that is, this offer——

Q. I can't hear you.

A. This other job, you mean?

Q. Yes, when you took over as foreman did you get more money?

A. I think it was a nickel raise.

Q. A nickel per hour? A. Yes, sir.

Q. Now, what were you doing before you took the job as foreman?

A. I was working in the warehouse.

Q. And what work would that require, what did you do?

A. After setting out orders, I went on the truck a time or two on deliveries around town; and it was putting out orders, and unloading cars.

Q. What did you do after you assumed the new job? A. I did the same thing.

Q. How did your work change?

A. There was only one change that I could say, and that was they give me the key to the warehouse. I carried the key to the warehouse.

Q. Did the other people have a key?

A. No, sir.

(Testimony of Lyle Carson.)

Q. Did your new job require any new duties that you had not [320] performed before?

A. There was one there where after I took over that was checking in the bills, freight bills and things, in the office.

Q. (By Mr. Roll): You had never done that before? A. No, sir.

Q. Did you do it all the time after you took the new job?

A. Well, not all the time. I did most of the time while I was there on the job.

Q. Now, explain to us what that is. How would you perform that?

A. Well, the freight would come in, the truck lines bring freight in, and the cars, and each night, as near as we could, we checked those freight bills in with the manager, and then those bills was placed in the file.

Q. Do I understand, now, that when merchandise came into the warehouse—How would that come?

A. It would come by truck, or by by car freight.

Q. By truck or rail? A. Rail.

Q. And when you would take the merchandise from the truck, or the car, then what would you do?

A. We would check it into the warehouse.

Q. And how did you do that?

A. We had a billing on it, bill of lading on it to check it in by. And then in the process of—in the evening when we [321] checked the—when I checked in with the manager we would check

(Testimony of Lyle Carson.)

against these here invoices, to see if there was any shortage or anything of that sort.

Q. (By Mr. Roll): I don't quite yet understand. Did you check the actual merchandise that came in on a bill of lading, or on an order slip, to see whether you got everything that was on the slip?

A. If it wasn't short we just checked it from the bills, the freight bills, that we received from the truck line. Our cars that come in we had—we had our sheets from Salt Lake, and we checked them by our sheets from Salt Lake, and we had a freight bill on them.

Q. Those were the slips, those bills then, were the ones you would turn in at night?

A. Yes, the ones we checked in at night.

Q. Now, what would you do there in the manager's office?

A. Just go in there and check those bills in.

Q. Well, would checking them in, does it amount to anything more than just handing them to him, or what would you do?

A. No, he had to check the bills. I had the invoices, or you might—I don't know what you call them—bill of lading—invoices, I guess, and we checked those against the sheets that we received from Salt Lake. And then they were filed away, after we had reference there.

Q. Now, do you recall the former manager leaving, and Mr. Walker assuming the position as manager? [322] A. Yes.

(Testimony of Lyle Carson.)

Q. (By Mr. Roll): Do you recall when that occurred?

(No answer.)

Q. I don't remember the date, but do you remember that happening? A. Yes.

Q. Did you talk with Mr. Walker when he became manager concerning your authority as foreman? A. Not that I can remember.

Q. Pardon me?

A. Not that I can remember.

Q. Well, has Mr. Walker ever told you what authority you had?

A. He called me foreman, and he said I had authority to order the boys around, but which I refused to do. I refused to take action that way.

Q. To whom did you refuse to do that?

A. Mr. Walker.

Q. When did he tell you that you had the authority to do that?

A. Oh, I would say it was sometime in February of Fifty.

Q. February of Fifty?

A. February or March.

Q. Was there anybody else present when you had this conversation? [323] A. No, sir.

Q. (By Mr. Roll): Try, if you will now, and give us the detail of that discussion. What did Mr. Walker say to you, and what did you say to him?

A. Well, he—I couldn't say he was complaining, but I should say he was trying to bolster me up as foreman to boss the other fellows around, to

(Testimony of Lyle Carson.)

give them orders, and that instead of doing the work myself, that is, some work myself, that I should give the orders to them and let them do it. And I told him that I didn't like to give orders of that kind, and more or less refused.

Q. Now, what do you mean, "more or less", Lyle? Tell us just what you said.

A. Well, I just refused to give them orders. What orders I give the boys came from Mr. Walker.

Mr. Callister: What was that again, Mr. Reporter? Would you read it back, read that answer for me, please?

(Answer read.)

Q. (By Mr. Roll): Well, explain how that was done, then, Lyle.

A. You mean the ordering?

Q. Yes.

A. Well, I would—if Mr. Walker wanted something done, at times he told the men out in the warehouse, and at times he told me and I would relay that to the men. [324]

Q. (By Mr. Roll): Now, did you—No. Strike that. At that time, or before, or at any time, were you told that you had authority to hire?

A. No, sir.

Q. Do you know whether you did have authority to hire?

A. I never exercised that authority. I don't know. As far as I know, I did not have.

Q. Did you ever hire anybody?

A. I did not.

(Testimony of Lyle Carson.)

Q. Did you ever recommend to Mr. Walker that somebody be hired?

A. No, sir, not that I can remember.

Q. Have you ever fired anyone?

A. No, sir.

Q. Have you ever recommended that anyone be fired?

A. No, sir.

Q. When people were hired after you became foreman who did it?

A. Mr. Walker.

Q. Did he consult you?

A. No, sir.

Q. When new people were hired who directed them in breaking them in in their new job?

A. The men in the warehouse.

Q. Did you give men training yourself? [325]

A. (Witness nods his head in the negative.)

Trial Examiner Doyle: You will have to speak up.

A. No, sir.

Q. (By Mr. Roll): What, in your work, either as a workman or as a foreman, did you do independently, using your own initiative?

(No answer.)

Q. Do you understand my question, Lyle?

A. Not thoroughly.

Q. What work did you just—did you perform where you made your own decisions as to what you did?

A. Well, in the warehouse we would make decisions ourselves—I would make decisions myself, if I wanted something placed somewhere, or I could see some place where something would go, and I would a lot of times make my own decisions on

(Testimony of Lyle Carson.)

that. Lots of times I consulted the other boys about it before I performed it.

Q. Now, are you talking about where to pile a certain pile of goods? A. Yes, sir.

Q. When you made the decision as to where the goods should be piled, how would you get them piled then?

A. I would do it myself, or ask the other fellows if they would help me.

Q. Have they always complied when you made such requests? [326] A. Yes.

Q. (By Mr. Roll): Have you criticized any of the men in the warehouse for the type of work that they did. A. No, sir.

Q. What was your answer?

A. No, sir, not to my knowledge, I haven't.

Mr. Callister: What was that last statement? I didn't hear it.

(Answer read.)

Q. (By Mr. Roll): Did you tell the men what orders to fill? A. No, sir.

Q. Did you tell the truck drivers when to take their trucks out? A. No, sir.

Q. Did you keep track of the time they were gone? A. No, sir.

Q. Checking on how promptly they delivered?

A. No, sir.

Q. Did you check with customers to see what kind of service the customers were getting?

A. I did not.

Q. Did you receive complaints from customers?

(Testimony of Lyle Carson.)

A. No, I did not.

Q. If a man was late for work what did you do?

A. I just went about my work, and there was nothing said, as [327] far as I was concerned.

Q. (By Mr. Roll): What if one of them didn't show up, at all?

A. That was, I figured, no concern of mine. I was working in the warehouse.

* * * * * [328]

Q. (By Trial Examiner Doyle): Did you keep any time books or records?

A. I kept records on the freight cars, is all, and they were turned in.

Trial Examiner Doyle: All right. Pardon me.

Q. (By Mr. Roll): Well, what about the men's time, did you keep their time? A. I did not.

Q. Did anyone ever come to you and ask for a raise? A. Not directly to me for a raise, no.

Q. What do you mean, "not directly," Lyle?

A. Well, they might mention a raise.

Q. Pardon me.

A. They might mention a raise, but they didn't come and ask me for one.

Q. Did any of them complain to you that they were having to work too long hours, work too hard, or anything?

A. No; there was no complaint on that.

* * * * * [329]

Q. After you assumed the title of foreman did you have preference in what time you chose your vacation?

(Testimony of Lyle Carson.)

A. I didn't assume that, I did not exercise that.

Q. Were you told that you could have preference?

A. I was not, no, sir.

Q. What did you do, Lyle, to warrant the payment of an extra five cents an hour?

A. Well, as near as I can gather, I had the keys to the warehouse, and done the checking.

Q. Well, what was your normal work week?

A. Forty hours a week.

Q. Monday——

A. Monday through Friday.

Q. ——through Friday. Did you open the warehouse up in the morning?

A. No, not always.

Q. Who else had a key?

A. Mr. Walker.

Q. Were you two the only ones that had keys?

A. To my knowledge, yes. [330]

Q. (By Mr. Roll): And how late did you work at night?

A. Well, we knocked off around five o'clock, and then at times I and Mr. Walker would check in after closing time.

Q. Did you personally work any hours that the other men did not work?

A. Yes, there was nights there where customers was late getting in for their order, and Garretts, or the truck lines was getting—was late getting over to pick up the freight, that I stayed there in order to do it.

(Testimony of Lyle Carson.)

Q. When you did that did you turn in over-time? A. I did not, no, sir.

Q. Did you receive extra pay of any kind for that?

A. At times Mr. Walker would allow me an hour's overtime.

Q. Would you put in for it?

A. I did not, no, sir.

Q. Did you come down there on Saturdays?

A. I did a few—one or two Saturdays I come down there to let customers have orders out.

Q. Did you used to do that before your—before you became a foreman?

A. No, sir, I didn't have a key before that.

Q. Did you put in overtime for your Saturday work?

A. No, sir.

Q. Did Mr. Walker pay you overtime for it?

A. That I couldn't say, because he would just grant me an [331] hour now and again on my overtime, and I couldn't say just what that was for, that is, just when it was for.

Q. (By Mr. Roll): Well, when you got over-time did Mr. Walker tell you "I am giving you overtime for this particular thing", or would it—

A. No, it collected to a matter of some time, and he would say "I will give you so much over-time for this, and so much for that."

Q. How did he keep track of that.

A. He had a time book in his office.

Q. Did you take a company car home at night?

(Testimony of Lyle Carson.)

A. I did at times.

Q. Would you drive a company car for your personal use? A. No, sir.

* * * * * [332]

Q. (By Mr. Roll): How many employees were there in the warehouse, Lyle?

A. I believe six.

Q. Did that include yourself?

A. That included myself.

* * * * * [333]

Q. (By Mr. Roll): Now, did you alone do the billing, or did everybody bill?

A. No, I mostly alone did the billing.

Q. Did you do the billing before you were given the title of foreman? A. No, sir.

Q. How much time would be required in doing billing?

A. Well at times it might be four hours, maybe longer; other times it wouldn't take so long.

Q. What is billing, Lyle?

A. That's writing for Garretts, or for the freight lines, we had to bill our goods, that is, write out the articles, put the weight down on them, and who they were to go to, and who they went by, and we had to write those bills out, just bill the—bills of lading.

Q. Now, when you finished writing them out what did you do with them?

A. They were hung on a hook in that little room, and the freight line come and picked them up.

Q. Where did they come from? Did you pick

(Testimony of Lyle Carson.)

the slips up in the office and take them into the little office to fill out, is that it?

A. Well, no, it—Yes, yes and no. There was times we would put up the orders out in the warehouse, and when they [334] got them checked they would bring them in to me, and I would bill them and send them into the office.

* * * * *

Q. (By Mr. Roll): I believe the record is clear on this, Mr. Carson, but were you paid by the hour, or were you paid a salary?

A. I was paid by the hour.

Q. Was that the same way the other employees were paid? A. Yes, sir.

Q. Were you instructed by Mr. Walker to report to him in the event the men were not doing satisfactory work?

A. Yes, at times I—he instructed me at times to.

Trial Examiner Doyle: You will have to speak up a little louder, please.

A. At times he instructed me to report if there was any difficulty out there in the warehouse.

Q. Did you do it? A. I did. [335]

Q. (By Mr. Roll): Did you report on anybody as having—as doing unsatisfactory work?

A. Well, one or two incidents I spoke about one of the men.

Q. Now, will you tell us what that involved?

A. That was——

Q. Just briefly state if he was asleep on the job, or whatever it was.

(Testimony of Lyle Carson.)

A. Well, at times he would argue about putting something away.

Q. Did you make a recommendation to Mr. Walker as to what to do on those occasions?

A. No, sir.

Q. Did you criticize the man directly yourself?

A. No.

Q. Do you know whether Mr. Walker criticized the man? A. I do not.

* * * * *

Q. (By Mr. Roll): Did you ever send anyone home for any reason, any of the workmen?

A. No, sir.

Q. Did you ever send a man to Mr. Walker for criticism? [336]

A. No, sir.

Q. (By Mr. Roll): In Mr. Walker's absence did you receive instructions from anyone?

A. Well, I—there was times when the office force would come out, especially on the orders if we had a customer there waiting for an order, and they would come out and tell us to put that order up first.

Q. Now, the office force, are you referring to the two girls in the office? A. Yes, sir.

Q. Was there anything in your warehouse work, as performed by the men or performed by yourself, that was other than routine? Did you do anything that constantly changed, or did you invariably do things the same way?

A. It was more or less the same way.

(Testimony of Lyle Carson.)

Q. Was there a standard procedure for, that you followed, in doing these things?

A. Well, to a certain extent.

Mr. Callister: Doing what things? Do you mean his work?

Mr. Roll: Yes.

Q. (By Mr. Roll): That is, piling the merchandise, loading the trucks, filling the orders, did you do those things the same way all the time?

A. Yes. * * * * * [337]

Q. Did you participate with Mr. Walker in making any decisions concerning policy?

A. I don't quite understand that question.

Q. Did Mr. Walker and you discuss any matters relating to policy, and how the warehouse should be run, how the work should be done down there?

A. Yes, we did.

Q. A number of such discussions?

A. Well, not too numerous, no.

Q. Can you give us an example of one? What would the substance be, just briefly?

A. Well, we would suggest to each other some way of making room in the warehouse for the merchandise; and I might suggest something to him, and he would suggest something to me.

Q. Do you know whether the other employees made similar suggestions? [338]

A. I believe they did.

Q. (By Mr. Roll): Did you lay out work schedules for the men? A. No, sir.

* * * * * [339]

(Testimony of Lyle Carson.)

Q. (By Mr. Roll): When was the next attempt to organize, Mr. Carson?

Mr. Callister: What was that question, please, Mr. Reporter?

(Question read.)

A. I believe it was in August.

Q. (By Mr. Roll): Of what year?—Nineteen fifty? A. Nineteen fifty.

Q. Did you have any discussions with any company official concerning the union, in particular, Mr. Walker? A. Not at that time.

Q. Did you later? [340] A. Yes.

Q. (By Mr. Roll): When was the first such discussion that you can recall, just approximately?

A. I believe it was in August, the middle of August.

Q. About the middle of August?

A. Uh huh.

Q. Where did the discussion take place?

A. In the warehouse—or, in the office.

Q. In Mr. Walker's office?

A. Mr. Walker's office.

Q. Was there anyone else present?

A. I don't believe so.

* * * * * [341]

Q. (By Mr. Roll): Yes. Will you relate the conversation that you had with Mr. Walker, briefly? Just tell us the substance of it.

A. As near as I can remember, Mr. Walker asked me—or told me that he had seen the boys in the warehouse grouped up there, and he thought

(Testimony of Lyle Carson.)

they were talking about the Union. And he said, "There seems to be some"—I can't say the word, but "some dissatisfaction out there in the warehouse", and wanted to know if I knew anything about it, if the boys had been [342] talking to me about it. And I told him no, that I didn't know anything about it. And he asked me to kind of listen around a little bit, and find out.

Q. (By Mr. Roll): Did he say what he wanted you to find out?

A. No, he didn't come right out and say that. I presume it was——

Q. Well, we don't need what your—what you thought about it. Was there anything more to that discussion with Mr. Walker, now?

A. No, I think at that time that was all of that.

Q. Did you have a later discussion with him?

A. I did.

Q. About when did that occur?

A. That was about that September sometime.

Q. Do you recall whether it was before or after the election?

A. Around the first of September.

Q. About the first?

A. Yes.

Q. That would be before the election?

A. Yes.

Q. Where did that conversation take place?

A. That was in the office.

Q. Was there anybody else present?

A. No, sir, not that I recall. [343]

(Testimony of Lyle Carson.)

Q. (By Mr. Roll): Will you relate the substance of the conversation now?

A. That there was—Mr. Walker asked me again about if I had had—if the men had said anything about union, or if they had forgotten it, and I told him they hadn't mentioned it to me. He said, "Well"—as near as I can relate, he says, "Well, they have probably forgotten about it." But, he still seemed——

Mr. Callister: Well, just state what he said, Mr. Carson.

Q. (By Trial Examiner Doyle): Did he say any more than that?

A. Well, there could have been a little more, but I don't quite grasp what it was.

Q. (By Mr. Roll): Was there a later conversation, did you have another conversation with Mr. Walker later about the Union? A. I did.

Q. Now, about when would that be?

A. That was, oh, I would say about two weeks later, ten days, or something of that sort.

Q. About September—that would be about September fifteen?

A. The fifteenth, somewhere around there.

Q. It would be after the elections?

A. Yes.

Q. All right. Where was that conversation held?

A. That was in the office. [344]

Q. (By Mr. Roll): And who was present?

A. Just I and Mr. Walker.

Q. What did Mr. Walker tell you then?

(Testimony of Lyle Carson.)

A. He said he couldn't understand why the boys wanted to join the Union, as they were getting union scale, and would pay out dues and initiation fees which wouldn't do them any good, because the Union couldn't do anything for them.

Q. Did he tell you anything more?

A. Oh, he did tell me that he had written to Mr. Peel about me—or, Mr. Peel,—he got a letter from Mr. Peel—Well, I am mixed up on that.

Q. Well, just think about it a little bit, and see if you can clarify it in your mind, Lyle.

A. He wrote to Mr. Peel—well, I won't say he wrote to him, but he got word to Mr. Peel, so he told me, that I was the only one—that I was the one that hadn't—I don't know how to word that—hadn't agreed to the Union, to joining the Union, and Mr. Peel—or, he said that I was a pretty good sort of fellow, and didn't want to join the Union. And I related to him that I had joined, and he referred to—after—when he found out that I had joined, that it must have been Harris.

Q. Must have been Harris?

A. Yes.

Q. Are you referring to Harris Ranson? [345]

A. Yes.

Q. (By Mr. Roll): What must have been Harris?
A. That hadn't voted for the Union.

Q. Oh, I see.

A. That's as near as I can recall that.

Q. Is that all you can recall of that?

A. Yes.

(Testimony of Lyle Carson.)

Q. Was there any discussion about the elections, either of the elections?

A. I don't quite grasp that. Do you mean——

Q. I will rephrase the question. Was there one election in which one vote was cast against the Union?

A. Yes.

Q. And is that the matter to which you referred?

A. That's the one I referred to.

Q. Did Mr. Walker talk with you again at a later time about the Union?

A. No, I don't think so.

Q. All right. Did you go on strike with the rest of the men on March fifteen?

A. I did.

Q. Fifty—Nineteen fifty?

A. I did.

Q. Did you receive your pay on March fifteen?

A. I did not. [346]

Q. (By Mr. Roll): Did you discuss your pay with anyone, in particular, Mr. Walker?

A. Not on the fifteenth.

Q. Did you at any other time in that period?

A. On the sixteenth we did. That's when we went in after our checks.

Q. You went into the company office?

A. Yes.

Q. Who all went in, Lyle?

A. As near as I can recall, there was Eddy Mattox, Harris Ranson, Reed Ritchie and myself.

Q. Was there anyone else in the office besides Mr. Walker?

A. There the girls—there was the girls there, the office girls.

(Testimony of Lyle Carson.)

Q. Tell us in substance what was said. What did Mr. Walker tell you?

A. Mr. Walker — or, Mr. Mattox asked Mr. Walker about the checks, and Mr. Walker said that he had—they had come, but he had to send them back to Salt Lake, because—to have them—I can't think of that word, either.

Q. Take your time, and think about it.

A. Anyway, he had to send them back to Salt Lake because the day of the fifteenth—it was made out for the day of the fifteenth which we was out on strike, and they had to send them back to remedy that. And he also said that our raise was on [347] the checks, and he came up there and figured out on paper there how much we would have made if we would have stayed in instead of going out on strike.

Q. (By Mr. Roll): Was there anything more said by Mr. Walker at that time?

A. No, not at that time.

Q. Did you do picket duty? A. Yes, sir.

Q. Were you picketing in the month of April, the first part of April? A. Yes.

Q. Did you have any conversations with Mr. Walker while you were on the picket-line?

A. I did.

Q. Can you tell me about when?

A. It was the first part of April, somewhere around between the third and the sixth, I believe.

Q. Was there anybody else present at the time?

A. No, sir.

(Testimony of Lyle Carson.)

Q. Was there any—another picket on duty?

A. Yes.

Q. Who was that?

A. That was Reed Ritchie.

Q. And where was he picketing from where you and Mr. Walker were? [348]

A. He was out on the sidewalk, and Mr. Walker drove in the yard a ways and called me over to him.

Q. (By Mr. Roll): Will you relate that discussion, please?

A. Well, Mr. Walker come over and handed me a letter from Salt Lake, from Mr. Peel at Salt Lake that Mr. Walker had received. I don't know the date of the letter or when it was received here, but it was some time back. And he showed me the letter where Mr. Peel had——

Mr. Callister: Well, just a minute.

Q. (By Mr. Callister): Are you going to relate what was in the letter, now?

A. Along with my question there.

Mr. Callister: We object. Where's the letter? The letter is the best evidence.

Q. (By Mr. Roll): Did Mr. Walker give you the letter, Lyle?

A. I see the letter, but he retained it.

Q. You don't have the letter with you?

A. No. * * * * * [349]

Q. (By Mr. Roll): Tell us your conversation with Mr. Walker. Did you have a conversation?

A. Other than the letter?

Q. Pardon me?

(Testimony of Lyle Carson.)

A. Other than the letter?

Q. Yes. A. Yes, I did.

Q. What was your conversation?

A. Mr. Walker told me that—asked me why I didn't leave [350] the picket-line and find a job, and I told him that I had no authority from the Union to leave the picket-line and leave our—or, no, he said, Mr. Walker told me that—to leave the picket-line and go out and find a job like the rest of the boys. And I told him that they were just out temporarily on jobs there, until this was settled, and he says as far as he was concerned, and also the company, they were out for good.

Q. (By Mr. Roll): When you say “they were out for good”, what do you mean?

A. We were out for good.

Q. Out from what?

A. Out from the job, we were off the job, we were canned off from the Symns job. And he says, “Why don't you”—this is the words he used, as near as I can state—“Why don't you sneak off and find other employment?” And I told him I couldn't, because I wasn't authorized by the Union to do so, and when they told me to leave the picket-line I would leave.

Q. Did the picket-line continue? Or, strike that, please. Was there any more in that conversation?

A. Well, just that he said that we were all through with Symns Wholesale, we would never get our jobs back. That's the words he used, as near as I can remember.

(Testimony of Lyle Carson.)

Q. Did you continue doing picket duty?

A. I did.

Q. Do you know how long the picket-line continued? [351]

A. It continued until, I believe, the eighteenth of May.

Q. (By Mr. Roll): Did you picket up until May eighteenth? A. I did.

Q. At that time were you told to cease picketing by the Union?

A. They come over that night and told me that they had a job for me.

Q. Now, after you ceased picketing, Mr. Carson, did you apply for employment at the company?

A. I did not, no, sir.

Q. Did any company official offer you employment? A. No, sir.

* * * * * [352]

Q. (By Mr. Roll): Possibly I could help you. Was anyone authorized by you to seek reinstatement for you at the company?

A. I answered No, I believe.

Q. What answer do you wish to give? [353]

A. I give the answer Yes.

Q. (By Mr. Roll): Who was that, Mr. Carson?

A. Mr. Mattox.

Q. And where did that occur?

A. Over at the Union Hall.

Q. Were others present? A. Yes.

Q. Who were the others present?

A. I believe——

(Testimony of Lyle Carson.)

Q. Let me ask you this: Was it the employees of the Idaho Falls store? A. Yes.

Q. Now, you mentioned that you had a set of keys to the warehouse. What did you do with those keys?

A. On the day of the strike I got permission from—or, asked Mr. Mattox if I could go in and return the keys, and he said “Yes.”

Q. Who did you give them to?

A. I gave them to Mr. Walker.

Q. Did you have a conversation with Mr. Walker at that time? A. I did.

Q. What was that conversation?

A. I handed him the keys, and told him I guessed I didn't have any more use for them, and he—I believe at that time he told me that I didn't have to go out on strike, that I was [354] supposed to be a foreman, and I didn't have to go out on strike. And I informed him that I was sticking with the boys, and even if I didn't go out on strike I would be canned for not reporting for work, as I wouldn't cross the picket-line. And he said at the time that he felt sorry I felt that way about it, and I told him that was the way it had to be, and I believe then I walked on out.

Q. (By Mr. Roll): Did you discuss with Mr. Walker the reason why you were on strike? Did you give him a reason?

A. Yes, he asked me—or, I told him that we were striking, as we were after a contract. And we spoke about Union Shop there, and he said that

(Testimony of Lyle Carson.)

was out, that we could not—we would never get the Union Shop, that Symns Wholesale, or, if I remember correctly, Mr. Peel at Salt Lake would close the doors before he would grant us a Union Shop.

Q. Well, what reason did you give him for striking, at that time?

A. Well, we were after, trying to negotiate for a contract, and didn't seem to be getting anywhere with it, and it had been some time, and we was getting worried, you know? more or less what was happening and what was going to happen.

Q. In these conversations that you had with Mr. Walker, that you have testified to, did you relay the information to the other employees of what Mr. Walker told you?

A. Well, there was one incident about wage increase or, not [355] —yes, the wage increase there.

Q. (By Mr. Roll): Now, what was that?

A. And that was——

Q. Did you have a discussion with Mr. Walker about a wage increase? A. Yes.

Q. When was that, Lyle, as nearly as you remember?

A. That was after—I believe, after the election.

Q. After the election? A. Yes.

Q. Was it in the same month, would you say?

A. Now, I just couldn't verify that.

Q. Can you fix it with respect to the date of the strike, was it before the strike, or after the strike? A. It was before the strike.

(Testimony of Lyle Carson.)

Q. Can you say about how long before?

A. About, I would say, a week, or maybe ten days.

Q. It was between the election and the strike?

A. Yes.

Q. Now, will you tell us where the conversation occurred?

A. That was in Mr. Walker's office.

Q. Was there anybody else present?

A. I don't recall whether there was anyone else present, or not.

Q. What was that discussion? [356]

A. Well, as near as I can recall, we were talking about wages, about a wage increase, and the Government freezing the wages and things, and Mr. Walker said that we had a wage increase coming. And I may have related that to some of the boys out in the warehouse.

Q. (By Mr. Roll): Do you know for sure whether you did, or not?

A. It seems like I did.

Q. You are not certain of that?

A. I am not certain.

Q. Will you tell me now, and using the language that Mr. Walker used, as best you can recall, what did he say about it, about the wage increase?

A. Well, as near as I can recall, Mr. Walker said that the Government would not allow a wage increase before, but they had released one, if I remember correctly, they had released it there, a six-cent raise, and it should be on our checks.

(Testimony of Lyle Carson.)

Q. What was that last statement?

A. It should be on our checks.

Q. Did you—When was your next check? Did you get another check after that date?

A. It seems like we did.

Q. Was there a wage increase on it?

A. No, sir. * * * * * [357]

Cross Examination

Q. (By Mr. Callister): Mr. Carson, did you work under Kay Wright when he was foreman?

A. Yes, sir.

Q. And, did he tell you what to do?

A. Not necessarily tell us what to do. He asked us to do things.

Q. That's what I mean, in other words.

A. Yes, he asked us to—

Q. I think you are getting—I think you have the thought that there is a difference between asking a man to do something, and telling him to do it?

A. Yes.

Q. You think there is a difference, do you?

A. Well, demanding—

Q. Yes. In other words, he never demanded that you do it? A. No; no, he told us to.

Q. But, he would ask you, would you please do this and that, [358] and that's the way you did, also, didn't you? A. Yes.

Q. (By Mr. Callister): Now, Kay Wright had a key to the warehouse, didn't he, the same as you did? A. I believe so.

(Testimony of Lyle Carson.)

Q. That's right. And would Kay Wright go out on the truck when he was the foreman?

A. Not that I know of. Not to my knowledge, he did not.

Q. In other words, he had to be there all the time, is that right? A. Well, yes.

Q. Now, as I recall your testimony here today, you stated that when Mr. Walker called you in and told you you was the foreman he said you had the authority to order the men around, is that right? A. Yes.

Q. And he told you that you were the foreman, isn't that what he said? A. Yes.

Q. And did he tell you about your duties, as to what you were supposed to do?

A. No, I don't believe so.

Q. Well, he told you to do the same as Kay Wright had been doing, didn't he?

A. No, sir, he didn't mention Kay Wright.

Q. (By Mr. Callister): Well, he said you were the foreman, the same as Kay Wright, didn't he?

A. Well, he said I was the foreman.

Q. That's right. And you were taking Kay Wright's place? A. Yes, sir.

Q. Now, were the men advised, do you know, whether or not you were made foreman, were they so told?

A. I couldn't say to that, no.

Q. Well, they knew that you took over Kay Wright's job? A. Yes, they knew that.

Q. You were in the court room here when the

(Testimony of Lyle Carson.)

gentleman testified this morning and stated that he knew that you had taken over Kay Wright's place?

A. Yes, sir.

Q. Now, you related an incident here today to the effect, as I recall, that when some of the boys didn't do what they should have done you reported to Mr. Walker, is that right?

A. No, I don't think I made a statement to that effect.

Q. Well, maybe I got it wrong. What did you say regarding that?

A. That's when I said a time or two that, I believe, that I would ask the boys to do something and they would—they didn't really refuse, but they—Well, I don't know just how to phrase that.

Q. Well, you reported their not doing the job to Mr. Walker, [360] didn't you? A. I did.

Q. (By Mr. Callister): And they knew that, didn't they?

A. The boys didn't, as far as I know.

Q. But, that was one of your duties, wasn't it, to report to Mr. Walker the men who were not doing their job?

A. To my knowledge, I didn't have any duties of that sort.

Q. Well, you did that, though, didn't you?

A. At one or two times.

Q. Yes, that's right.

A. Yes, I did.

Q. And you did it only on those occasions when it arose? A. Yes.

(Testimony of Lyle Carson.)

Q. That's right. Now, Mr. Walker told you, did he not, to keep an eye on the boys to make sure they were doing their job right?

(No answer.)

Q. Didn't he tell you that, in substance and effect?

A. Well, I believe he did say to keep the boys going, yes.

Q. That's right. In other words, if somebody started to sit down and loaf it was your job to see that he got back to work, wasn't it?

A. It should have been, I imagine.

Q. Yes. And if any of the boys were doing things they shouldn't, you were to straighten them out, weren't you? [361]

A. Well, I would send them into Walker, if necessary.

Q. (By Mr. Callister): That's right. But, my point, what I am getting at, Mr. Carson, is that you, if you saw one of the boys doing something that wasn't wrong (sic) you would either send him into Mr. Walker or you would report to Mr. Walker about it, wouldn't you?

A. Yes, I imagine so.

Q. Now, when you were notified by Mr. Walker that you were foreman you were given an increase in wages, weren't you? A. No, sir.

Q. Was it right afterwards?

A. When I was in foreman Mr. McEntire was the boss.

Q. Oh, I see. Well, as foreman you received five

(Testimony of Lyle Carson.)

cents an hour more than the men working with you, didn't you? A. I did.

Q. And when you became foreman they gave you five cents an hour increase? A. Yes.

Q. When Mr. Kay Wright was there would he direct the activities of the men, as to how and what to do? A. Well,—

Q. Where it became necessary to do so?

A. Yes, he did.

Q. In other words, Mr. Carson, because there were only about five men the men pretty well knew what their duties were, didn't [362] they?

A. Yes, they did.

Q. (By Mr. Callister): But, when the occasion arose, or it was necessary to tell them what to do, you did it, didn't you? It may not have occurred often, but when it did you would tell them, wouldn't you?

A. Well, they would ask me their advice—ask my advice on it.

Q. They would come to you to find out what to do, wouldn't they, is that right?

A. Or go to Mr. Walker.

Q. Yes. When they wanted to know what to do they would come to either you or Mr. Walker?

A. Yes.

Q. Mr. Walker was a salesman as well as manager, wasn't he? A. Yes, sir.

Q. He was out of the office quite a bit, wasn't he? A. Quite a bit.

Q. The major portion of his time?

(Testimony of Lyle Carson.)

A. Yes.

Q. Your answer is Yes? A. Yes.

Q. Will you speak a little louder? I want to make sure the reporter gets your answers.

A. All right. [363]

Q. (By Mr. Callister): Now, in his absence, you would answer the questions of the boys to the best of your ability, wouldn't you?

A. I would.

Q. And if anything came up at that time when Mr. Walker was away that required the attention of somebody to tell the boys what to do, you would do it, wouldn't you? A. Yes.

* * * * *

Q. (By Mr. Callister): Now, Mr. Carson, with relation to the warehouse, the office was in what may be termed the western portion of it, was it not?

A. Yes, sir.

Q. And there was a partition inclosing the office separate from the rest of the warehouse, wasn't there?

A. Well, you might say there were rooms there,——

Q. Yes.

A. ——and doors to the rooms.

Q. Yes, that's what I mean, that's what I am getting at. In other words, the office was——

A. The office was closed in.

Q. Yes, and separate and distinct from the warehouse? [364] A. Uh huh.

Q. (By Mr. Callister): So that if you wanted

(Testimony of Lyle Carson.)

to go in the office you would have to open a door to go in? A. That's right.

Q. For all practical purposes, when you were out in the warehouse you could hear nothing of what was going on in the office, and vice versa?

A. That's right.

Q. Now, on this strike meeting of August (sic) fourteenth, when you decided to go out on strike, do you recall that time? Not August fourteenth. Pardon me. I mean March fourteenth.

A. Yes.

Q. You were told that Salt Lake had gone out on strike that morning, weren't you?

A. Yes, sir.

Q. And that because of that you should go out on strike the next morning, wasn't that it?

A. To that effect, yes. * * * * * [365]

Redirect Examination

Q. (By Mr. Roll): Will you state—Strike that. What Union representatives were present in the meeting of the employees on March fourteenth, the night before the strike?

A. There was one Union member.

Q. I am talking about Union representatives.

A. That's when I mean, representative.

Q. Who was that? A. Eddy Mattox.

Q. Eddy Mattox? A. Yes.

* * * * * [366]

Q. What did Mr. Mattox tell you in that meeting before you took the vote?

(Testimony of Lyle Carson.)

A. As near as I can recall there, Mr. Mattox told us that Salt Lake had gone out on strike, and asked us if we wanted to go out on strike here it would probably be advantageous to us to.

Q. Did he tell you anything more?

A. I don't recall.

* * * * * [367]

Mr. Callister: So that will save time, then, rather than to testify, that these checks which were sent to the employees [372] and arrived here on the fifteenth of March, the day on which they went out on strike, included the pay for March fifteenth, and which is a day they didn't work. Now, those checks were computed based upon the then hourly wage rate which had been in effect for some period of time, namely, a dollar and seventeen cents an hour; and then, when Mr. Walker saw that they included the day on which the men went out on strike and had not worked he then sent them back to Symns, to have reissued checks to show exactly the days actually worked, and would not include the fifteenth, the day of the strike, which they did not work.

And we have shown these to Mr. Roll, and I think he will agree with me that that is the fact. Is that correct, Mr. Roll?

Mr. Roll: That is correct, counsel. And, in substance, that was the statement I intended to make to the Examiner. When I inspected the checks I found that there was no increase indicated on the checks that I inspected.

Mr. Callister: That's right.

Trial Examiner Doyle: For that final week of employment before the strike?

Mr. Roll: That's correct. * * * * * [373]

ROBERT PEEL

a witness called by and on behalf of the Respondents, having been heretofore duly sworn, was examined and testified as follows: [384]

Direct Examination

Q. (By Mr. Callister): You are the same Robert Peel who has heretofore been sworn and testified? A. I think so, yes.

Q. Mr. Peel, I want to direct your attention to the meeting of March—or, of November twenty-fourth, which was referred to here by Mr. Mattox this morning and Mr. Garrett, and I am going to ask you, if you will, to relate that conversation as best you can recall, and I want you to keep in mind that I don't want conclusions or your opinions, I want you to relate, as best you can, what you said, what Mr. Garrett said, if anything, and what Mr. Mattox said. Now, you may not be able to do it exactly in verbatim, but in substance and effect if you can.

A. Well, that was a long meeting, I think well over two hours.

Q. I see.

A. The conversation was opened by Mr. Mattox saying he would like to talk about that contract that they had sent to us.

(Testimony of Robert Peel.)

Q. Go ahead.

A. I was trying to get my thoughts straight as to the continuity of the thing.

Q. Sure. Take your time. May I direct your attention to this thought, Mr. Peel: I don't want you to relate matters not [385] connected directly with the negotiations, the negotiation of the contract. In other words, if you had subjects foreign to that I don't want to have you testify to that. I just want you to testify to that subject matter that relates to the negotiations.

A. Well, they—either Mr. Mattox or Mr. Garrett had a copy of the contract with the wholesale grocers on which we were a signatory, and which was very closely worded to the one that Mr. Mattox had sent to us. And I had made the statement that we would like uniformity; we had just given a wage increase in August, and that we thought it was a little early for another one, and I suggested that the present scale be carried out as it was in my written proposal. Mr. Mattox said, "You are not giving us the same deal on vacations." And I said, "If we haven't, we will make them conform." And I started to get our copy of the contract, and Mr. Garrett had one with him.

Q. (By Mr. Callister): Now, your copy of the contract referring to what? A. Vacations.

Q. Well, what contract?

A. Our Salt Lake contract. I said I would make them conform. They had a copy of the—of our contract, so I didn't get ours out. We talked about

(Testimony of Robert Peel.)

the various proposals. I explained that if we would grant the wage increases that they requested of us, and they did not—and our competitors did [386] not have to pay them that we would have to go out of business, we couldn't compete. Mr. Mattox said that that was their opening price. And nothing very serious was talked about as far as wages at that time.

Then they asked about holidays. We couldn't be uniform on holidays, because Salt Lake has a July the twenty-fourth holiday, a state holiday, which we grant in that contract; in Idaho it is not a state holiday. So, I said, "Well, we will give them Armistice Day, instead, in order to make it uniform."

Q. (By Mr. Callister): That was something that had not been in effect up in Idaho here?

A. It hadn't been.

Q. I see.

A. And so that seemed to be agreeable.

I explained to them that we didn't have any line drivers, as such, and that there wasn't any reason for a separate category.

Now, I had on November the sixteenth suggested a form of contract, and I was—I told them at that time that I was willing to sign that contract.

Q. As you had proposed?

A. As we had proposed. But that, of course, carried no wage increase beyond the present scale. And I also told them that the Salt Lake contract was up for discussion, or would be, and that we were unable to tell what the wage increase would

(Testimony of Robert Peel.)

be at [387] Salt Lake, and so I couldn't tell them what we would like to apply at Idaho Falls.

I did say to them that the competitive situation was getting to the point of where free deliveries of groceries two hundred miles from our base was eating us up, and if something didn't happen to that situation we would be out of business, anyway.

Q. (By Mr. Callister): Well, you found it necessary to sell did you not?

A. Yes, but that was not the sole reason.

And that, in substance is pretty much the extent of that conversation. There was a long—We talked about a great many things. And when Mr. Mattox left the office with Mr. Garrett he said to me, in a friendly manner, "Well, get us some word as soon as you can. But, under any circumstances, we are going to have the Union Shop." That was the last word I heard him say.

Q. Had you discussed Union Shop on that date?

A. Yes, we had discussed the Union Shop. The two gentlemen tried to tell me about the beauties of the Union Shop, and I told them that I had been hearing that for nine years, and that they hadn't succeeded in telling me anything new, and I hadn't changed my mind on the subject.

Q. Was anything further said at that time, as you recall?

A. Not that I can recall offhand.

* * * * * [388]

Q. Now, Mr. Peel, do you recall when negotiations started with respect—or, first, I will ask you,

(Testimony of Robert Peel.)

are you a member of the Industrial Relations Council? A. I am.

Q. And have you authorized and directed them to negotiate [391] for you with respect to your contract in Salt Lake with the Teamsters Union?

A. Yes.

Q. (By Mr. Callister): And they have for some period of years, have they not?

A. Yes, quite a long time.

Q. Now, are there other wholesale grocers in that group, besides yourself, who negotiate simultaneously?

A. Well, there is the Utah Wholesale——

Q. Now, where is their plant?

Q. At Salt Lake, and they have various branches throughout the state.

Q. Yes, but what branches—Do they have any branches other than the Salt Lake branch that is represented by the Union?

A. I don't know that they have.

Q. All right. Now, who else is there, Mr. Peel?

A. There's John Scowcroft and Sons.

Q. And what branches do they have?

A. They have, I think Price is their branch that's involved there, and Ogden.

Q. And what about Salt Lake?

A. And Salt Lake.

* * * * * [392]

Q. Now, then, did you meet with the Union at any other time?

A. In regard to Salt Lake?

(Testimony of Robert Peel.)

Q. Yes.

A. I surely did. There was so many meetings that I wouldn't be able to——

Q. Do you recall when they first started?

A. Well, they—the Union, I think, asked for a reopening in January, but I don't think they started much until February, if I remember. That's—I don't know about that, that's a guess.

* * * * * [393]

Q. Now, Mr. Peel, in these meetings at Salt Lake was anything said about Idaho Falls?

A. I don't recall anything being said about Idaho Falls, until the—oh, the last—the meeting of March the twenty-seventh Mr. Lott was there, and I think that was the first time—and then the meeting of April the sixth with Mr. Latter in my office, and then the meeting of April the ninth in the Council office.

* * * * * [394]

Q. Now, Mr. Peel, there was statements made by Mr. Mattox and Mr. Garrett this morning that—in substance and effect stated that you refused to negotiate at your conference of November twenty-fourth, as referred to by them, and the forepart of January, as you felt the meeting was, is that true?

A. Why, no. I offered them a proposal in writing; I discussed that with them, pro and con, and we came to a meeting of the minds on several points, and some we didn't. I don't know what meeting is.

Q. (By Mr. Callister): Well, were you ready

(Testimony of Robert Peel.)

and willing at that time and subsequent times to discuss any proposal they had?

A. I was, except Union Shop.

Q. Well, when you say Union Shop, you told them how your feelings were on that?

A. Certainly.

Q. However, Mr. Peel, you did agree in Salt Lake in the fore part of Nineteen fifty—one to what is referred to as a maintenance of membership union contract?

A. My mind isn't clear as to the date on that, but that's in that contract, and it's my impression that it was in the previous year but I may be mistaken on that. But we agreed to a maintenance of membership contract.

Q. Which in effect says that those who are now members must remain members for the duration of the contract?

A. That was it, but that they didn't have to be Union members to get work with us.

Q. But, if they joined the Union they must remain members for the duration of the contract?

A. Yes. * * * * * [400]

Q. That's what I am getting at. In other words, as the result of your March twenty-seventh meeting the wholesale grocers—that is, we are now referring to Utah Wholesale Grocers and John Scowcroft and Sons—entered into an agreement, or agreed to enter into an agreement with the Union, is that right.

A. Yes.

(Testimony of Robert Peel.)

Q. Now, why didn't you at that time enter into an agreement, Mr. Peel? [403]

A. Because I knew that this question of these men was going—bound to come up. We were the only house who had attempted to operate to any extent. We had the only employees, except one other house had one, Scowcrofts had one. I knew that that problem was to come up, and rather than to hold up the proceedings any more, and to get the other two houses out of it, I disagreed and let them agree.

Q. (By Mr. Callister): Well, did you offer the same proposal to the Union that the other wholesale grocers did?

A. Except that that clause in there, that they usually put in, to the effect that we would discharge these men. I made that a provision that we would not discharge the men.

Q. Well, as to other terms and conditions of employment, did you agree the same as they did?

A. Identically, yes.

* * * * *

Q. (By Mr. Callister): Mr. Peel, what did you offer, if anything at that time, with respect to a proposal to the Union? [404] That's, now, on March twenty-seventh.

A. You mean March twenty-eighth, the following day?

Q. (By Mr. Callister): Yes.

* * * * *

(Testimony of Robert Peel.)

Q. (By Mr. Callister): Did you understand the question, Mr. Peel?

A. I understand you say what did I offer the Union?

Q. If anything. If you didn't offer anything, say so. Did you offer them—Did you make them a proposal? [405]

A. I offered them the same contract that the other houses had agreed to, except that clause that I would not discharge the men we had employed.

Q. (By Mr. Callister): Now, was that proposed for Salt Lake and Idaho Falls, or just for Salt Lake, or just for Idaho Falls?

A. It was to cover them both.

Q. Now, what was the answer by anybody there representing the Union with respect to that proposal? In other words, I just want you to tell me what was said and by whom. Now, was anything said by any Union representative with respect to your offer?

A. No, the offer was not made directly to the Union. It was made to the Industrial Council and relayed to the Union.

Q. I see. Now, were you convening in separate rooms at that time?

A. No, you are—I am talking about the twenty-eighth. Are you talking about the twenty-seventh, or the twenty-eighth?

Q. Well, I thought it was—thought we were talking about the twenty-seventh, Mr. Peel. Was there another meeting on the twenty-eighth?

(Testimony of Robert Peel.)

A. I made no offer on the twenty-seventh. It was the following day, I testified, that I made the offer.

Q. All right. Now, on the twenty-eighth who was present? What was that type of a meeting? Now, tell us about that.

A. That was not a meeting. That was a phone call to Mr. [406] Hampton from my office, saying that I would sign the same deal, except that the men would not be discharged.

Mr. Roll: Mr. Examiner, I object, and move the answer be stricken, because any offer to Mr. Hampton—there is no indication that that was an offer to the Union.

Trial Examiner Doyle: Well, I don't know——

Mr. Callister: Let me say this—Pardon me. Go ahead, your Honor.

Trial Examiner Doyle: I don't know about that. If counsel can in any way prove that this offer was communicated by Mr. Hampton to the Union, then it will be connected.

Mr. Callister: Well, let me say——

Trial Examiner Doyle: I will let it stand for the present.

Mr. Callister: Yes. Let me say this, Mr. Roll, if there is any question about the fact—Is there any denial about the fact that the Union was offered, so far as Salt Lake City was concerned, the same contract that was offered by the other wholesale grocers? I don't think there is any controversy on that, is there?

(Testimony of Robert Peel.)

Mr. Roll: I am not questioning what Salt Lake City was offered. The only issue material to this proceeding is Idaho Falls, and I would object if we are talking about the Salt Lake City contract.

* * * * * [407]

Q. Now, Mr. Peel, at the time that the Utah Wholesale Grocery [422] talked to you, that is, Mr. A. B. Smith, with regard to the purchase of the merchandise, fixtures of your plant here in Idaho Falls, did you ever advise him of the fact that a charge was pending from the Teamsters Union filed with the National Labor Relations Board? A. I never did.

Q. (By Mr. Callister): And did you at any time subsequent thereto?

A. I talked to him later when we got notice of a suit, or whatever you want to call it.

Q. Well, but I mean up to the time the complaint was filed?

A. No.

Q. Can you tell us why you didn't?

A. Well, frankly, I didn't know that there was anything like this coming up. It never entered my head that we were in violation of anything of the kind.

Mr. Callister: That's all. You may cross examine.

Cross Examination

Q. (By Mr. Roll): Mr. Peel, did I understand your testimony to be that there was no settlement on April twenty-eighth (sic) in Salt Lake City,

(Testimony of Robert Peel.)

no settlement of any kind, or what was your testimony?

A. No, I didn't testify to that. I said that the Symns Grocer Company made no settlement on March the twenty-eighth. The other two houses did.
* * * * * [423]

Q. In March, March twenty-sixth to March twenty-ninth, you are not certain as to those dates, and what meetings were held or who was present? That was your testimony, wasn't it?

A. Oh, I am very certain as to who was present, but I can't place the initial meeting, but I know the continuity of the meetings, and that sort of thing.

Q. Uh huh. The particular date that things occurred during [428] that period you are not certain of, is that right? A. No.

Q. (By Mr. Roll): That is your testimony?

A. I know that they followed in that order.

Mr. Callister: Well, now—Oh, pardon me. Go ahead.

Q. (By Mr. Roll): Now, going back to the November twenty-fourth meeting that you had with Mr. Mattox and Mr. Garrett, I believe it was your testimony that at that time you informed them you were agreeable to signing some contract, is that right? Did you offer to sign a contract on April—or, on November twenty-fourth? A. Yes.

Q. I am referring to Nineteen fifty.

A. Yes, I offered to sign the contract that we have proposed to them on November the sixteenth.

(Testimony of Robert Peel.)

Q. That is the contract that is in evidence now as General Counsel's Exhibit number Three, is that correct? A. No, sir, it's——

Q. I will hand it to you.

A. It isn't a written contract, it's a proposal.

Q. A proposal? A. Yes.

Q. And is that the proposal (Indicating Exhibit Three)? A. That's what I mean.

Q. Will you state what concessions were made in your counter-proposal [429] from those conditions actually in existence in Idaho Falls on November twenty-fourth, Nineteen fifty?

A. Well, for one thing, there was no contract at Idaho Falls.

Q. (By Mr. Roll): That's right. The conditions, then, in existence in Idaho Falls, what change was there in your proposal, or your counter-proposal over the existing conditions? That is, you advocated the same wage rate that you were then paying, isn't that right?

A. Yes.

Q. You agreed to a change in vacations, isn't that correct? A. Yes, sir.

Q. You agreed to alter holidays to conform, since Salt Lake has a state holiday you make that Armistice Day in Idaho Falls, isn't that correct?

A. Yes, sir.

Q. There were no other concessions, isn't that right? A. Yes, sir.

* * * * * [430]

Q. (By Mr. Roll): Mr. Peel, in that same meet-

(Testimony of Robert Peel.)

ing of November twenty-fourth did you say that Mr. Garrett produced the Salt Lake contract?

A. One or the other had a contract, as least, they said, "I have got one right here", and then we decided it wasn't necessary to go into the discussion further.

Q. Now, you didn't go down that contract, paragraph by paragraph, and discuss it, did you?

A. Oh, no. * * * * * [434]

Q. At the conclusion of that meeting didn't you say that you would be in Idaho Falls—that you expected to be in Idaho Falls soon, and that you would contact Mattox?

A. I don't recall making that, but I wouldn't deny it that I did. [441]

Q. (By Mr. Roll): You didn't go, however?

A. Not for some time.

Q. And what was the first date that you came to Idaho Falls following November, Nineteen fifty?

A. Well, that was after the settlement at Salt Lake, oh, about four days, I think it was, after.

Q. You would place that at about the thirteenth, then? The settlement was reached on the ninth, wasn't it?

A. The ninth. Somewhere in that neighborhood.

Q. And the thirteenth would be——

A. On Friday.

* * * * * [442]

Q. (By Mr. Roll): I want to know how you can establish with such accuracy that Mr. Mattox and Mr. Lott (sic) called upon you in January—

(Testimony of Robert Peel.)

Mr. Mattox and Mr. Garrett, rather, called upon you in January, Nineteen fifty-one, instead of November twenty-fourth, Nineteen fifty?

A. I tried to explain to you that I thought there was some mistake, and that was my best recollection. Now, I don't think that I ever met with them on November the twenty-fourth, and I have tried to establish another date that I think is closer to being correct.

Q. Are you as confident about that as you have been your other testimony?

A. No, I am not confident about it; I am trying to do the best job I can to recollect it.

* * * * * [444]

Q. Now, when you came up here at the request of the Mayor, about what date was that again?

A. I said about four or five days after that meeting at Salt Lake that settled up that contract, after, I think it was the ninth.

Q. And you went to the Union Hall, is that right? [445] A. Yes, sir.

Q. (By Mr. Roll): Who did you talk to in the Union Hall?

A. I don't know the lady's name. There was two women in there, and there was a man—and several workmen—I don't know whether the man belonged in there, or whether he was somebody else.

Q. Tell me the location of the Teamsters office in that Hall.

A. The Teamsters office that I went to to see these girls was at the back end of a hallway, and

(Testimony of Robert Peel.)

up in front they were building what looked like little offices on either side of a long hall; and they were—I think they were doing a lot of renovising out in back, too. I am not sure about that.

Q. Did you announce your name to the girls?

A. No. The young lady was in very much of a hurry to get away from me, and she grabbed these books and bundles and beat it off down to the end of the room, and she said, "Mr. Mattox isn't here," and I didn't feel like following her down there.

Q. Did you ask where Mr. Mattox was?

A. No. I asked if he would be in in the morning, and she said she thought he would.

Q. Did you inquire about Mr. Lott, where he was? A. No.

* * * * * [446]

Trial Examiner Doyle: On the record.

The document which counsel has referred to, as I understand it, is now stipulated to be the supplement to the Utah agreement. Is that correct?

Mr. Roll: It is a supplement signed by Mr. Peel, and attached to the supplement is the agreement which was reached in settlement; and the supplement specifies that the agreement was reached on March twenty-seven.

I ask the reporter to mark these for purposes of identification as General Counsel's Exhibit number Four.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4, for identification.)

(Testimony of Robert Peel.)

Mr. Roll: They are now offered, Mr. Examiner, pursuant to the stipulation.

Mr. Callister: We have no objection, Mr. Examiner.

Trial Examiner Doyle: All right. It is received, and marked General Counsel's—What is that?

Mr. Roll: Exhibit number Four.

Trial Examiner Doyle: Number Four.

(The document heretofore marked General [452] Counsel's Exhibit No. 4 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 4

This agreement is entered into this 9th day of April, 1951, by and between the Symns Grocer Co., 327 W. 2nd So., Salt Lake City, Utah, and Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 222, Salt Lake City, hereinafter referred to as the union, affiliated with International Brotherhood of Teamsters, Chauffeurs & Helpers, AFL.

Article 1

The company and the union agree that the strike which has existed at the company plant in Salt Lake City is settled as of this date on the same terms and conditions as that reached on March 27, 1951, between said union and John W. Scrowcroft & Sons Co. and Utah Wholesale Grocery Co.

Article 2

The company and the union each agree that the

General Counsel's Exhibit No. 4—(Continued)
agreement entered into between the Union and the companies named in Article 1 above as a result of the settlement reached by them on March 27, 1951, shall become the agreement between the union and the Symns Grocer Co. Each party agrees to be bound by the provisions of said agreement during its duration. Copy of the agreement is attached hereto.

Signed this 11th day of April, 1951.

For the Company:

/s/ ROBERT PEEL

For the Union:

/s/ FULLMER H. LATTER

/s/ ERNEST BAILEY

* * * * * [453]

Q. (By Mr. Roll): Now, you testified that you were informed that a Salt Lake Union Official claimed to be—claimed to have authority to bargain and sign a contract for Local nine eighty-three, is that correct?

A. Mr. Lattner didn't say that he was going to sign a contract. He said, "I am entitled"—"I am empowered to settle."

Q. To settle? A. Yes, sir.

Q. Did you and Mr. Latter—Could you and Mr. Latter agree upon terms of a settlement, in the absence of Mattox and Lott? I mean, did you, I will put it, rather than could you—Did you reach an agreement with Mr. Latter?

(Testimony of Robert Peel.)

A. No. I offered to settle. The Union wouldn't settle until they got this replacement business out of the way.

Q. And when you are referring to the Union you are referring [454] to Mr. Latter?

A. Mr. Latter, yes.

Q. (By Mr. Roll): And not to Mr. Mattox and Mr. Lott?

A. They weren't at that meeting.

Q. All right. Did Mr. Latter show you any authority——

A. No.

Q. ——that he might have, any evidence that he did have authority——

A. No.

Q. ——to bargain for the Union?

A. No. I would have insulted him, if I had asked for that.

Q. Is that unusual in labor-management relations?

A. Well, it is with Mr. Latter. We get along pretty well, and we take his word when he gives it.

Q. Now, with respect to your local manager here, Mr. Walker, he had authority to hire, did he not?

A. Yes.

Q. He had authority to fire?

A. Yes.

Q. He had authority to settle grievances?

A. What's that?

Q. He had authority to settle grievances, did he not?

A. Well, I suppose he did. He always exercised it up to a point.

* * * * * [455]

(Testimony of Robert Peel.)

Q. (By Mr. Roll): He didn't have authority to raise wages? A. He did not.

Q. But, he raised them anyway?

A. He did that without our knowledge.

Q. Is he still in your—Did he continue in your employ thereafter? A. Yes, sir.

Q. He had authority to hire, authority to fire, authority to settle grievances, and did raise wages, and had no authority, whatever, to negotiate?

A. He certainly didn't.

Q. Not even to enter into discussions——

A. No, sir.

Q. ——with the Union? A. No.

* * * * * [456]

Recross Examination

Q. (By Mr. Roll): Does G C-Three, your letter which purports to be a counter-proposal, state that you agree to the remainder of the contract?

A. No, I don't think it does.

Q. Did you inform Mr. Mattox or Mr. Garrett that you would agree to the remainder of their proposals, if they would agree to those proposals?

A. No, sir. I said not.

* * * * * [462]

Mr. Roll: General Counsel proposes the admission in evidence of General Counsel's Exhibit number Five, which is a document furnished by Symns Grocer Co., in response to a subpoena, and indicate the names, and dates of hire and termination of employees on and after March thirteenth—

(Testimony of Robert Peel.)

March fifteenth, up to the date of sale, I believe.

Q. (By Mr. Roll): Isn't that correct, Mr. Peel?

A. Yes; I think it says there, July seventh, or something.

Mr. Roll: And, Mr. Examiner, I have only one copy, so if the Examiner would waive the duplicate, otherwise I shall write one out in longhand.

Trial Examiner Doyle: Well, we don't need to do that.

Mr. Roll: Would the reporter mark that as General Counsel's Exhibit Five?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 5, for identification.)

Mr. Callister: We have no objection to its introduction.

Trial Examiner Doyle: All right. The copy is waived. The document is received, and marked General Counsel's Exhibit Number Five.

(The document heretofore marked General Counsel's Exhibit No. 5 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 5

Idaho Falls Warehouse Employees After
March 14, 1951

Hired 3/15—Cecil C. Scott; terminated: 4/2.

Hired 3/15—Dale White; terminated: 3/17.

Hired 3/19—Marvin Smith; still working July 7.

General Counsel's Exhibit No. 5—(Continued).

Hired 3/19—Mervin J. Gardner; terminated:
5/18.

Hired 3/19—Dale Anderson; terminated: 5/9.

Hired 3/19—William S. Stanger; terminated:
4/20.

Hired 3/20—Lyle Welker; terminated: 7/5.

Hired 3/20—Denzil Rowberry; still working July
7th.

Hired 4/20—Wayne C. Hill; still working July
7th.

Hired 4/19—Marvin McGary; still working July
7th.

Hired 5/8—Dwayne Heilesen; still working July
7th.

* * * * * [463]

Mr. Roll: I have one inquiry to make before the decision on proceeding further. Our stipulation this morning concerning the continued operations of the business by Respondent, Idaho, the new firm, it was my understanding that counsel stipulated in behalf of both Respondents, is that correct?

Mr. Callister: No, I don't believe I stated—I don't believe I did, but I will be glad to do so, because, frankly, there would be no sense in saying it for one and not for the other. I am sure that if I didn't—as you recall my memory, I think I only stipulated on behalf of the Idaho, but I will be glad to make it both.

Trial Examiner Doyle: I don't think it was very

clear. But now if you will stipulate on behalf of both Respondents?

Mr. Callister: Oh, yes, surely.

* * * * * [465]

Mr. Garrett recalled.

HARRY W. GARRETT

a witness called by and on behalf of the General Counsel, in rebuttal, having been heretofore duly sworn, was examined and testified as follows:

Trial Examiner Doyle: Mr. Garrett has been sworn.

Direct Examination

Q. (By Mr. Roll): It is my recollection, Mr. Garrett, that your earlier testimony was that you and Mr. Mattox met with Mr. Peel to negotiate for the Idaho store on November twenty-four, Nineteen fifty, is that correct?

A. That is correct.

Q. In the course of your Union business do you keep a record of your daily contacts in your work?

A. I keep an appointment calendar, which shows my appointments during the day, day by day.

Q. Do you have your appointment calendar with you for November, Nineteen fifty?

A. I do.

Q. Would you inspect that for the date of November twenty-fourth, Nineteen fifty, please?

A. I will.

(The witness produced a sheet from a calendar pad to Mr. Roll.)

(Testimony of Harry W. Garrett.)

Mr. Callister: Let me see this. If Mr. Garrett says [468] that's it, that's it.

(Mr. Roll handed calendar sheet to Mr. Callister.)

Mr. Roll: Will counsel also agree that the calendar be read into the record?

Mr. Callister: Oh, yes.

Q. (By Mr. Roll): Would you read what writing appears on your calendar for November twenty-four, Nineteen fifty, Mr. Garrett?

A. (Reading calendar sheet): "Nine-thirty To Symns Grocery with Eddy Mattox on negotiations with Mr. Peel.

"Two-thirty With Mr. Mattox on negotiations with Nelson-Ricks for Mr. Manwaring in Rexburg."

Mr. Callister: May I ask a question?

Mr. Roll: Surely.

Q. (By Mr. Callister): Now, Mr. Garrett—Let me see that a second—Doesn't it say "Two-thirty to Four p.m."? I think you didn't finish it.

A. "Two-thirty to Four p.m."

Mr. Callister: It was an oversight, I am sure, Mr. Garrett. A. Yes.

Mr. Callister: I just wanted to call it to your attention.

Q. (By Mr. Roll): Is that in your hand writing? A. Yes. [469]

Q. (By Mr. Roll): Do you recall going to Symns Grocer and meeting with Mr. Peel on the date thereon indicated? A. Yes, I do.

Q. Handing you what is now in evidence as

(Testimony of Harry W. Garrett.)

G-Three and G-Two, being the Union's—the company's counter-proposal and the Union's proposal, respectively, will you state in that meeting with Mr. Peel on November twenty-four, Nineteen fifty, whether Mr. Peel agreed to reduce to writing and sign anything?

A. I must first explain that G-Two, the Union's proposal, I never saw until now, until today, rather, when it was given to me for identification. But, G-Three, which is Symns Grocer's counter-proposal, I did see, because that one was discussed in that meeting of November twenty-fourth, Nineteen fifty. And the discussion, or offer from Mr. Peel in that meeting, and the only offer, is that which is expressed in Exhibit G-Three, identified as Symns Grocery Company's counter-proposal to the Union.

Q. Were the provisions which are set forth in G-Three discussed between you and Mr. Mattox and Mr. Peel, all of them?

A. No; I recall discussion on only wages, which stymied all other discussions, because they were wholly unacceptable to the Union.

Q. Did Mr. Peel in that meeting offer or agree to an interim agreement? And, by "interim" I mean an agreement to be effective until the negotiations in Salt Lake were concluded [470] for Nineteen fifty-one?

A. When the Union refused to agree to the wage scale contained in here for an annual contract, then Mr. Mattox asked Mr. Peel if he would sign an interim agreement to be effective until negotiations

(Testimony of Harry W. Garrett.)

in the Salt Lake area were completed, containing this wage scale; and Mr. Peel refused to sign such an interim agreement.

Mr. Roll: You may examine.

Cross Examination

Q. (By Mr. Callister): Now, Mr. Garrett, this interim agreement that you refer to was proposed by Mr. Mattox? A. Yes.

Q. All right. Now, did Mr. Mattox propose that an interim agreement be entered into between the date of your meeting of November twenty-sixth—or November twenty-fourth, rather, of Nineteen fifty, until the Salt Lake agreement was entered into, was that his proposal?

A. That was it.

Q. That was it. So that as I understand you, then, Mr. Garrett, Mr. Mattox proposed—Will you pardon the repetition, Mr. Roll and Mr. Examiner?—an interim agreement to take over that period of time between the meeting of November twenty-fourth and the conclusion of the Salt Lake negotiations? A. That's right.

Q. Now, Mr. Peel made a proposal, didn't he, which is the [471] Exhibit G-Three, didn't he?

A. Yes.

Q. (By Mr. Callister): And Mr. Mattox would not accept the wages as proposed, I assume?

A. For a year's duration.

Q. Well, didn't Mr. Peel state to you that he would give to the Idaho Falls employees anything

(Testimony of Harry W. Garrett.)

that was agreed to in Salt Lake? A. No, sir.

Q. He didn't? A. He did not.

Q. That was just Mr. Mattox's proposal, is that right? A. That they give——

Q. Well, let's take it in chronological order?

A. Yes.

Q. It was Mr. Mattox's proposal to keep this thing an interim agreement until the Salt Lake negotiations were held, is that right?

A. That's right.

Q. Now, isn't it true that Mr. Mattox and yourself and Mr. Peel discussed the advisability of having a uniform contract between—the same as in Salt Lake as in Idaho Falls? Wasn't that discussed?

A. Mr. Peel——

Q. Well, wait a minute. Yes, or no. Was it discussed? [472] A. It was discussed, yes.

Q. (By Mr. Callister): That's right. That's what I want to know. A. It was discussed.

Q. That's right. Did Mr. Peel refuse to put into execution or writing what he proposed in G-Three—G-Three here (indicating exhibit)?

A. For an interim period, he did.

Q. Well, now, Mr. Garrett, isn't it—isn't this what happened—Think back, and take your time a minute. Isn't this what happened, that Mr. Mattox wanted an increase over the rate as proposed by Mr. Peel in G-Three, and which Mr. Peel refused to do because of the fact that he had given an increase recently, namely, August of Nineteen fifty; isn't that what happened?

(Testimony of Harry W. Garrett.)

A. I am afraid I am confused with that question. I wish you would restate it.

Q. I apologize, Mr. Garrett. I don't wish to confuse you. A. It is involved.

Q. Well, maybe it is, and I apologize to you. Isn't it a fact that Mr. Peel refused to accept or to execute a contract for a wage increase in excess of that as proposed in G-Three?

A. Well, yes, he did refuse to.

Q. That's right. And wasn't that the difference—I will withdraw that. A few minutes ago you said that, as I recall [473] your testimony, that the crux, or the difference that you had on that meeting was wages, wasn't it? A. True.

Q. (By Mr. Callister): And Mr. Mattox wouldn't accept the wage proposal of Mr. Peel, would he?

A. For a year's duration, he wouldn't.

Q. Well, did Mr. Mattox agree to accept the wage proposal that Mr. Peel offered in his letter, G-Three?

A. He asked him if he would do it, and Mr. Peel said No, on an interim basis.

Q. Are you sure of that, Mr. Garrett?

A. That's certainly the way I recollect it.

Q. In other words, Mr. Garrett, you want us to understand that Mr. Mattox was willing to accept G-Three, which is the letter of November sixteenth, as the entire agreement?

A. Oh, no; that's just the wage scale.

Q. All right, now we are getting some place.

(Testimony of Harry W. Garrett.)

A. This is no contract.

Q. That's right. This wasn't your interpretation, but Mr. Peel offered it (sic). Now, Mr. Garrett, it's a fact, then, that Mr. Mattox was not willing to accept G C-Three as the agreement, was he, as proposed by Mr. Peel?

A. Certainly not, because it isn't any sort of an agreement.

Q. All right. What did Mr. Mattox agree to accept as an interim agreement, in the way of provisions, did he outline them? [474]

A. He asked Mr. Peel for—if he would make an interim agreement with the wage scales proposed here (indicating Exhibit Three)—

Q. (By Mr. Callister): You are now refering to G C-Three?

A. Yes. Which are the same as the wage scales in the Salt Lake contract at that time.

Q. Uh huh. And anything else?

A. And the remainder of the Salt Lake contract for that period, on an interim basis.

* * * * * [475]

Q. (By Mr. Callister): Now, Mr. Garrett, didn't Mr. Peel tell you at this meeting of November twenty-fourth that he would give to Idaho Falls anything that was agreed to in Salt Lake?

A. No, he did not. [476]

Q. (By Mr. Callister): He did not?

A. He did say, however, that he would not negotiate anything other than an annual contract on the

(Testimony of Harry W. Garrett.)

basis of this G-Three until after the Salt Lake negotiations were completed, and——

* * * * *

Q. (By Trial Examiner Doyle): Why would the subject of an interim agreement, which would terminate upon conclusion of the Salt Lake City negotiations—why did that come up, at all?

A. Well, the point is that we were quite sure that a wage increase would be negotiated in the Salt Lake area early in [477] Nineteen fifty-one. Consequently, we wouldn't want to be tied to the old scale for a full year in November. That was the reason.

Q. (By Trial Examiner Doyle): All right. Now, who was it that proposed the interim agreement?

A. Mr. Mattox, in my presence.

Q. Now, the interim agreement, as I understand it, would have set the wage scale according to the tenor of the company's offer in G C-Three, which was the same wage scale as then prevailing in Salt Lake City, is that right? A. True.

Mr. Callister: In Idaho Falls?

A. No, in Salt Lake City.

Trial Examiner Doyle: No, in Salt Lake City.

Mr. Callister: Well, apparently I misunderstood.

Q. (By Mr. Callister): I don't care to interrupt, but I understood from your testimony, Mr. Garrett, that this proposal, as outlined by Mr. Peel in G C-Two (sic), Mr. Mattox agreed to continue, is that right? That's the rate that was in existence at Idaho Falls.

Trial Examiner Doyle: No, I don't follow your

(Testimony of Harry W. Garrett.)

question, and I want to keep the witness, if I can, on my own.

Mr. Callister: Surely.

Q. (By Trial Examiner Doyle): As I understood it now, the proposal of Mr. Peel would have put the Idaho Falls scale the [478] same as the Salt Lake City scale then?

A. Existing at that time.

Q. (By Trial Examiner Doyle): At that time?

A. Yes.

Q. So that they Mattox made the offer to make that as an interim agreement?

A. That's right.

Q. Which would terminate when they reached a new wage scale in Salt Lake City?

A. Correct.

Q. Now, what was said, if anything, by either party about the effect on the Idaho Falls wages for the next year, what effect the Salt Lake negotiations would have on the Idaho Falls scale for the coming year? What that discussed, at all?

A. As I recall it, Mr. Mattox asked Mr. Peel if this interim agreement were signed the new negotiations, or the new contract negotiated, to be negotiated in Nineteen—early in Nineteen fifty-one in Salt Lake City, would be automatically adopted by him, and he refused to make a commitment upon that. And I remember one statement very clearly, that he says, "I will not grant any form of Union security." Meaning to us, of course, if Union secu-

(Testimony of Harry W. Garrett.)

rity were negotiated in the Salt Lake contract that he would not grant it in Idaho Falls.

Q. Well, at any time did Mattox, on behalf of the Union, ask Mr. Peel to agree to accept the Salt Lake City rates, as negotiated, [479] for Idaho Falls?

A. Yes, in an interim agreement. But, he would not accept it for a year.

Q. (By Trial Examiner Doyle): Well, did you get to the point of taking up Idaho Falls for the coming year? What I am getting at is what effect was the Salt Lake City negotiations to have on your Idaho Falls rate?

A. That is not what we could not get a commitment on from Mr. Peel.

Q. All right.

A. And we were trying——

Q. I am not concerned so much with a commitment as I am—Did anybody ever say when we have negotiated a new rate at Salt Lake City we will expect to take it at Idaho Falls, or will you give it to us at Idaho Falls? or any such thing?

A. I believe we were not that liberal. I believe that we asked that the interim agreement be entered into with these wage scales offered, so that we might be free to negotiate a new agreement for the Idaho Falls district after the Salt Lake contracts were out of the way. Feeling that we would—that the Salt Lake negotiations would gain something more than just an increase in wages. Probably better conditions.

(Testimony of Harry W. Garrett.)

Trial Examiner Doyle: All right, good. I interrupted you, and if I may just——

Mr. Callister: I think it's very important, your Honor. [480]

Trial Examiner Doyle: ——ask one more question here.

Mr. Callister: Surely.

Q. (By Trial Examiner Doyle): How did this conference with Mr. Peel come to a close? And what I am driving at in particular is what was said about future meetings, negotiations, calls, correspondence, or anything of that sort. How did you end up, what was said by each of the parties?

A. Throughout the conference, and up until the end, a lot of pressure was exerted by Mr. Mattox upon Mr. Peel to negotiate immediately, either upon the basis of the Union's original proposal for a year, or upon the basis of the company's counter-proposal for an interim agreement, at once, because the men were very, very unhappy up here. So, when we found that Mr. Peel would do neither, then he told us that he would be in Idaho Falls very soon, to negotiate with the Union one way or the other. An agreement which never materialized.

Trial Examiner Doyle: All right. Go ahead.

Q. (By Mr. Callister): Mr. Garrett, the wages as proposed by Mr. Peel here in his G-Three were those which were then in effect, wasn't it?

A. That I believe to be correct.

Q. That's right.

(Testimony of Harry W. Garrett.)

A. Yes, they were in effect at the time, in November of Nineteen fifty, in Salt Lake City.

* * * * * [481]

Mr. Roll: It is hereby stipulated and agreed that if Mr. Bailey, Ernest Bailey, previously called and sworn, were to return to the witness stand and testify he would testify that he keeps a daily work record in which he makes notes of his contacts, and that work record does not show that he attended the Salt Lake negotiations on March twenty-sixth, Nineteen fifty (sic), but that he did attend on March twenty-seven, Nineteen fifty (sic), and that the March twenty-seven, Nineteen fifty (sic) negotiations resulted in agreement with the operators other than Symns Grocer, and that Mr. Callister, Mr. Peel, Mr. Smith, and Mr. Lott were present at that meeting.

Mr. Callister: We will stipulate that he would so testify.

Mr. Roll: Would you correct those dates to read March of Nineteen fifty-one, instead of March, Nineteen fifty. I am sorry.

It is further stipulated and agreed that if Mr. Lott were recalled to testify that he would testify that he was present at such a meeting on March twenty-seven, Nineteen fifty-one, and that Mr. Callister, Mr. Peel, Mr. Bailey, and those named [483] in his earlier testimony were present.

Mr. Callister: We will so stipulate that if Mr. Lott was called to testify that he would so testify.

Mr. Roll: He did testify to that earlier.

Trial Examiner Doyle: It is so stipulated.

* * * * * [484]

CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the Nineteenth Region in the matter of: Symns Grocer Co. and Idaho Wholesale Grocery Co. and Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 983, AFL, Case No. 19-CS-481, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY

Official Reporters

/s/ By LESLIE E. MOORE,

Field Reporter.



No. 14057

United States
Court of Appeals
For the Ninth Circuit.

L. C. CHAPMAN, Manager of the Regional Office
of the Veterans Administration,

Appellant,

VS.

MAREN ELWOOD COLLEGE,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

DEC 10 1953

PAUL P. O'BRIEN

No. 14057

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court in and for the
Southern District of California, Central Division

No. 15,445-WM

In the Matter of
MAREN ELWOOD COLLEGE.

PETITION FOR ORDER TO REQUIRE
PRODUCTION OF DOCUMENTS

Comes Now L. C. Chapman, Manager of the Regional Office of the Veterans Administration, Los Angeles 25, California, by and through his attorneys, Walter S. Binns, United States Attorney for the Southern District of California; Clyde C. Downing, Assistant U. S. Attorney, and Harry R. Talan, Special Attorney, and represents to the Court:

That in such capacity and under authority granted by the Administrator of Veteran's Affairs, Veterans Administration, Washington, D. C., an officer of the United States, he issued a subpoena under date of March 31, 1953, directed to Maren Elwood College, a non-profit California corporation, directing the said Maren Elwood College by Maren Elwood, Director, and/or Mrs. E. V. Byrnes, Accountant, respectively, of said college, to produce at the office of the said College, 4949 Hollywood Boulevard, Los Angeles, California, at the time of service of said subpoena, certain records of said College for the period of October 16, 1945, through January 31, 1953, described and designated as follows: [2*]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

(1) All Instructor Class Record Books, including Workshop and Study Halls, for the period 10/16/45 through 1/31/53.

(2) All monthly recap of attendance records—central office records—for the period 10/16/45 through 1/31/53.

(3) All emergency leave slips for veteran students for the period 12/1/49 through 1/31/53.

(4) All transcript of veteran student grades for the period 10/16/45 through 1/31/53.

(5) All individual veteran student folders, containing school retained copies of Veterans Administration documents consisting of award action, letters of authorization, certificates of eligibility, students individual schedules of classes, and correspondence by and between the veteran, the school, and the Veterans Administration.

That the aforesaid records are required in connection with a matter within the jurisdiction of the Veterans Administration, to wit, a pending audit by the Veterans Administration of the books and records of said College relative to attendance therein by veterans under Public Laws 16 and/or 346, 78th Congress, and in which the Veterans Administration has a direct and vital interest.

That the subpoena herein was issued by petitioner by virtue of and pursuant to the provisions of Sec. 300 of Public Law No. 844, 74th Congress, (49 Stat. 2033, 38 U.S.C.A. 131) which are:

“Sec. 300. For the purposes of the laws administered by the Veterans Administration, the Administrator of Veterans’ Affairs, and

those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, [3] to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Administration. Any person required by such subpoena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States.”

That said subpoena was served upon Maren Elwood College by being delivered personally to Estella V. Byrnes, Accountant and Office Manager at the office of said College located at 4949 Hollywood Boulevard, Los Angeles, California, at 3:00 p.m., on March 31, 1953, by John D. Pearson, a Finance Accountant, Finance Division, Veterans Administration Regional Office, Los Angeles, California, then acting within the course of his employment.

That there is attached hereto, as a part of this Petition, a copy of said subpoena together with the Affidavit of Service of the aforesaid John D. Pearson, marked “Exhibit A.”

That, as appears from the attached affidavits of John D. Pearson and of M. W. Watts, Finance Officer, Veterans Administration Regional Office, Los Angeles, California, said Estella V. Byrnes, Accountant and Office Manager of Maren Elwood College, after having been duly served with the subpoena, has refused and still refuses to produce the aforementioned records of the College for the period prior to January, 1950, and that although further demand was made therefor personally upon Maren Elwood, Director of said College, on and after April 1, 1953, she likewise has refused and still refuses to comply with said subpoena and has failed and refused to produce for examination the hereinbefore described records for the period prior to January, 1950.

That on or about April 14, 1952, the Veterans Administration Regional Office, Los Angeles, California, commenced an audit of the records of said College for the period commencing with October 16, 1945, and to date. On said date, April 14, 1952, John D. Pearson, in charge of said audit, orally notified Estella V. Byrnes that it was the intention of the Veterans Administration to audit [4] the College's attendance and related records for the period commencing with October 16, 1945, requested all said records for audit purposes and advised her that the same were not to be destroyed or otherwise disposed of during the course of the audit. The records thus requested were produced and a partial audit thereof made (to the extent of 10%). By November, 1952, it appeared that cer-

tain improper billings by the College resulted in an overpayment to it by the Veterans Administration. Several requests thereafter made by the Veterans Administration that the College consent to projection of the audit in order to establish the total overpayment by computation instead of a 100% audit have been ignored by the College. The audit is currently being continued, but is being limited to the period commencing with January, 1950, by reason of the refusal of said College to comply with the terms of the subpoena issued and served on March 31, 1953.

That the petitioner has reason to believe that the books and records, the production of which was directed by the subpoena, are of vital interest to the Veterans Administration as affecting the proper operation of the Veterans Administration and the welfare of certain veterans whom it serves, and as affecting the result of the pending audit of the school's records, and further, that without the production and examination of these books and records, the United States Government and the Veterans Administration will be unable to establish and verify the extent of overpayments heretofore made to said College as a result of alleged improper billings.

That as appears from the affidavits of said John D. Pearson and M. W. Watts, attached hereto as part of this petition, the records of said College for the period commencing with October 16, 1945, were in existence, in possession of said College and located in its office, as recently as April 1, 1953.

That this petition is filed herein pursuant to Sec. 302 of Public Law No. 844, (49 Stat. 2033; 38 U.S.C.A. 133) which provides: [5]

“Sec. 302. In the case of disobedience to any such subpoena, the aid of any district court of the United States or the Supreme Court of the District of Columbia may be invoked in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which the inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any officer, agent, or employee of any corporation or to any other person, issue an order requiring such corporation or other person to appear or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof (49 Stat. 2033; 38 U.S.C.A. Sec. 133).”

Wherefore, petitioner prays for an Order of this Court:

1. Impounding the aforesaid documents and records at the office of the respondent, 4949 Hollywood Boulevard, Los Angeles, California, from the date of the Court's Order until their inspection, examination and audit have been completed by representatives of the Veterans Administration;

2. Enjoining the respondent herein, its officers, employees, or any person acting for the respondent from destroying, tampering, removing, and in any

other manner disposing of the hereinbefore described records and documents.

3. Directing the respondent to produce and to make available the aforesaid records and documents for inspection by the representatives of the Veterans Administration at the office of respondent during its regular business hours. [6]

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ HARRY R. TALAN,
Special Attorney, Attorneys
for Petitioner. [7]

EXHIBIT A

Veterans Administration
Subpena (Duces Tecum)

Place Los Angeles, California.

Date: March 31, 1953.

In re: Maren Elwood College.

Miss Maren Elwood, Director, and/or Mrs. E. V. Byrnes, Accountant of Maren Elwood College, individually or in stated representative capacity, 4949 Hollywood Blvd., Los Angeles, Calif.

Madam:

By virtue of the power and authority conferred upon the Administrator of Veterans' Affairs by

section 300 of the Public Act No. 844, 74th Congress, approved June 29, 1936, you are hereby summoned and directed in the above matter within the jurisdiction of the Veterans Administration to produce at this time:

(1) All Instructor Class Record Books, including Workshop and Study Halls, for the period 10/16/45 through 1/31/53.

(2) All monthly recap of attendance records—central office records—for the period 10/16/45 through 1/31/53.

(3) All emergency leave slips for veteran students for the period 12/1/49 through 1/31/53.

(4) All transcript of veteran student grades for the period 10/16/45 through 1/31/53.

(5) See reverse side.

and any other evidence in your possession bearing on this subject. You will be allowed fees and mileage while in attendance at this hearing the same as are allowed witnesses before a district court of the United States.

/s/ CARL R. GRAY, JR.,
Administrator.

Countersigned: L. C. Chapman.

Official title: Manager, Varo, Los Angeles, Calif.

Section 300 of the Act of June 29, 1936, referred to above and Section 302 of said Act are printed on the reverse side hereof for your information and guidance.

This paper must be submitted when making claim for witness fees and mileage. [8]

Affidavit of Service by John D. Pearson

State of California,
County of Los Angeles—ss.

John D. Pearson, being duly sworn, deposes and says that he is employed as a Finance Accountant, Finance Division, Veterans Administration Regional Office, Los Angeles, California. That on the 31st day of March, 1953, at 3:00 p.m. he served the attached subpoena upon Maren Elwood College, a California non-profit corporation, and upon Estella V. Byrnes, by personally delivering the same to Estella V. Byrnes, individually and as accountant and office manager of and person in charge of the office of said Maren Elwood College at its principal office, 4949 Hollywood Boulevard, Los Angeles, California.

/s/ JOHN D. PEARSON.

Subscribed and Sworn to before me this 29th day of April, 1953.

[Seal] /s/ MARY MARCIE,

Notary Public, Los Angeles
County, State of California.

My commission expires July 23, 1954. [9]

AFFIDAVIT OF JOHN D. PEARSON

State of California,

County of Los Angeles—ss.

John D. Pearson, being duly sworn, deposes and says:

That he is employed as a Finance Accountant, Finance Division, Veterans Administration Regional Office, Los Angeles, California. That as such, and in charge of an Institutional Audit Team of the Finance Division, he appeared in person on April 14, 1952, at the principal office of the Maren Elwood College, 4949 Hollywood Boulevard, Los Angeles, California, for the purpose of commencing an audit of the College's records for the period commencing with October 16, 1945, and to date, relative to attendance therein by veterans under Public Laws 16 and 346, 78th Congress. That at said time and place he requested of and received from Estella V. Byrnes, the College's Accountant and Office Manager, all such records and stated to her that said records were not to be removed from the College, or otherwise disposed of, during the course of the audit and further notice thereon from the Veterans Administration in accordance with the contract with the College and applicable Veterans Administration Regulations. That said records continued available for examination by the Veterans Administration, and in November, 1952, it began to appear that certain improper billings by the College had resulted in overpayments to it

by the Veterans Administration during all of the period commencing with October, 1945. An audit of approximately 10% of the records indicated that a total overpayment of substantial proportion would develop. To facilitate the audit and to save needless cost to both the College and the Veterans Administration, it was requested that the College consent to projecting the 10% audit in establishing the total overpayment, rather than make necessary a 100% audit. To this date, the College has neither consented nor refused to adopt the projection method, thus making it mandatory that a 100% audit be actually made for the purpose of establishing the total overpayment.

Between February 18 and March 27, 1953, no work on the audit was done at the College. On the latter date deponent returned to the College for the purpose of continuing the audit on a 100% basis. However, the College, acting through its Director, Maren Elwood, and its Accountant and Office Manager, [10] Estella V. Byrnes, refused, and still refuses, to produce for the audit its records prior to January, 1950. On March 31, 1953, he served a subpoena upon the College and upon Estella V. Byrnes by personally delivering same to her at the office of the College. That said subpoena has been ignored and dishonored, and the College and Estella V. Byrnes have refused, and still refuse to produce the records required to be produced by said subpoena. That on April 1, 1953, and at the principal office of the College, he personally de-

manded of Maren Elwood, Director of said College, and who had not been available the previous day, that the records required to be produced by said subpena be then and there produced for audit, but she refused, and still refuses, to comply with the terms of said subpena, or to produce any records for the period prior to January, 1950. That the audit heretofore commenced on April 14, 1952, is presently in progress but in producing its records the College has and is continuing to remove therefrom all data, records and information covering the period prior to January, 1950.

/s/ JOHN D. PEARSON.

Subscribed and Sworn to before me this 29th day of April, 1953.

[Seal] /s/ MARY MARCIE,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires July 23, 1954. [11]

AFFIDAVIT OF M. W. WATTS

State of California,

County of Los Angeles—ss.

M. W. Watts, being duly sworn, deposes and says that he is the Finance Officer, Veterans Administration Regional Office, Los Angeles, California.

That on the 31st day of March, 1953, he accompanied Mr. John D. Pearson to the Maren Elwood College, 4949 Hollywood Boulevard, Los Angeles,

California. After requesting the college's attendance and related records for the period commencing with October 16, 1945, and to date, relative to veterans who attended said College pursuant to Public Laws 16 and 346, 78th Congress, and after it became evident that the college and Mrs. Byrnes, its Accountant and Office Manager, did not intend to furnish to the Veterans Administration such records for the period prior to January, 1950, and Mrs. Byrnes refused to produce same for audit by the Veterans Administration, he requested Mr. Pearson to serve Mrs. Byrnes with the attached subpoena. To the best of his recollection, the subpoena was so served on March 31, 1953, at about 3:00 p.m.

After the subpoena was served upon Mrs. Byrnes she called Mr. Winkler, the college's attorney, and discussed the matter with him. She stated to Mr. Pearson and to deponent at the end of that conversation that Mr. Winkler told her he would call back within ten minutes and advise her as to the course of action to be taken by the college in connection with production of books and records called for by the subpoena. Mr. Winkler did call back and Mrs. Byrnes then stated that upon his advice it had been decided not to make records for the period prior to January, 1950, available to the Veterans Administration auditors until such time as he, Mr. Winkler, could reach a final decision as to whether or not that should be done. Deponent then spoke with Mr. Winkler over the telephone. He con-

firmed that such had been his advice to Mrs. Byrnes, further stating that he would make his final decision thereon in three or four days. Deponent thereafter discussed this matter with the Chief Attorney of the Veterans Administration, Regional Office, Los Angeles, California, and on April 6 or 7, 1953, Mr. S. J. King of the Chief Attorney's office informed deponent that Mr. Winkler had advised him that the college, upon his recommendation, [12] would not make the records for the period prior to January, 1950, available to the Veterans Administration. This decision was confirmed by Mr. Winkler in a conference held in Mr. King's office on April 8, 1953, attended by Mr. King, Mr. Winkler, and the deponent, at which time Mr. Winkler stated further that he would recommend to the college that its records for the period prior to January, 1950, be impounded, by means of suitable chains and locks on the filing cabinets in which they are contained, pending an order in the matter by this Court, and that in the meantime the school continue to make available its records for the period after January, 1950.

Deponent has been advised officially by Mr. Pearson that records relating to veterans for the period prior to January, 1950, have not, as of this date,

been made available to Veterans Administration auditors by Maren Elwood College.

/s/ M. W. WATTS.

Subscribed and Sworn to before me this 29th day of April, 1953.

[Seal] /s/ MARY MARCIE,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires July 23, 1954.

[Endorsed]: Filed April 30, 1953. [13]

[Title of District Court and Cause.]

In the Matter of
MAREN ELWOOD COLLEGE.

ORDER TO SHOW CAUSE

It appearing from the Petition of L. C. Chapman, Manager of the Regional Office of the Veterans Administration, Los Angeles, California, and the accompanying affidavits of John D. Pearson and M. W. Watts, filed by and through his attorneys, Walter S. Binns, United States Attorney for the Southern District of California; Clyde C. Downing, Assistant U. S. Attorney, and Harry R. Talan, Special Attorney, that Maren Elwood College has not obeyed a subpoena issued on March 31, 1953, pursuant to the provisions of Section 300, Public Law No. 844 (49 Stat. 2033; 38 U.S.C.A. 131)

directing the said College to produce certain designated records and documents for the period from October 16, 1945, to January 31, 1953, inclusive, on March 31, 1953, in connection with a pending audit by the Veterans Administration relative to attendance of veterans as students at the said College under Public Laws 16 and/or 346, 78th Congress;

Now, Therefore, It Is Hereby Ordered that the said Maren Elwood College be and appear before the above-entitled Court in the Courtroom of the Honorable Wm. C. Mathes, United States District Judge, on the second floor of the Federal Building, 312 North Spring Street, Los Angeles 12, California, on the 11th day of May, 1953, at 10 o'clock a.m. and show cause, [14] if any, why the said College should not be ordered to produce the records and documents specified in the aforesaid subpoena issued by the Veterans Administration for the period from October 16, 1945, to and including January 31, 1953, in connection with a pending audit by the Veterans Administration relating to attendance of veterans at the said College under Public Laws 16 and/or 346, 78th Congress.

Dated: This 30th day of April, 1953.

/s/ WM. C. MATHES,
U. S. District Judge.

[Endorsed]: Filed April 30, 1953. [15]

[Title of District Court and Cause.]

REPLY OF MAREN ELWOOD COLLEGE TO
ORDER TO SHOW CAUSE AND SUP-
PORTING AFFIDAVITS

On April 30, 1953, this court issued, ex parte, its Order to Show Cause directed to the respondent herein, Maren Elwood College, requiring said college to appear and show cause why it should not be ordered to produce a large quantity of records and documents of the college described in a subpoena duces tecum issued by the Veterans Administration and covering a seven-year period of operation of said college, namely, from October 16, 1945, to and including January 31, 1953. By stipulation the hearing on said Order to Show Cause has been continued from time to time to the date presently set therefor on July 13, 1953.

Respondent earnestly asserts at the outset, as affirmatively appears from this reply and the detailed affidavit of Miss Maren Elwood, founder and owner of Maren Elwood College, that its refusal to accede to the broad and encompassing terms of the subpoena duces tecum referred to, is not based upon any [16] whim or caprice, or any arbitrary desire to disobey any lawful process or order. Rather, respondent's refusal to yield to the command of the Veterans Administration contained in the subpoena duces tecum, rests upon the firm belief that the terms of said subpoena duces tecum are oppressive and unreasonable, not authorized by law, and exceed the powers of the

Veterans Administration. Moreover, there is serious question of this court's authority or jurisdiction to issue the order prayed for herein by the Veterans Administration.

Statement of Facts

Although, as disclosed by the affidavits filed herein by the petitioner and respondent, there is some conflict on one or two factual points, there appears to be no dispute regarding much of the factual background giving rise to the instant controversy.

It is not disputed—nor can it be—that respondent college is a long-established institution of higher learning with high standards and highly qualified personnel. Maren Elwood College was established in 1923 for the giving of instruction and training in writing and has been in continuous operation ever since.

It was incorporated in 1948 as a non-profit organization and was recognized as an institution of collegiate grade qualified to issue a degree by the appropriate authorities of the State of California. It is thus apparent that respondent was not, and is not to be confused with “fly-by-night” schools which sprang up by the score immediately after the termination of World War II to take advantage of the education and training programs provided for veterans by the G. I. Bill of Rights.

Respondent college has had a continual contractual relationship with the Veterans Administration relating to veteran students studying there under

the terms of said G. I. Bill [17] of Rights. During this period as delineated in detail in the affidavit of Miss Maren Elwood, respondent college has been under the constant scrutiny of the State of California Department of Education, the General Accounting Office, and the Veterans Administration itself. There is no indication or suggestion that any of these investigations, spot-checks, and audits reflect adversely upon this respondent in any way or to any degree.

On or about April 14, 1952, the Veterans Administration commenced a "10% audit" of the books and records of respondent college stretching back to October, 1945. There is some conflict as to whether respondent was notified at that time to maintain all of its books and records indefinitely. Petitioner declares that respondent was so notified orally; respondent denies that such a notification was given. It would appear to be strange that so vital an instruction, if given, was not confirmed in writing.

In any event, there appears to be no dispute that this 10% audit was conducted by a team of auditors from the Veterans Administration at least until November, 1952, and it would appear from the affidavit of John D. Pearson, that such audit was still in progress, or work in connection therewith was still being done, as late as February 15, 1953.

It is not disputed that the Veterans Administration sought to have respondent agree to a projection of the results of this 10% audit by multiplying

its result by ten. There is disagreement as to whether respondent expressly refused to agree to such projection, or whether it made no response whatever to this suggestion of the Veterans Administration. Be that as it may, the fact is not disputed that respondent has not agreed to the proposed projection method of audit and has signed no agreement to that effect. [18]

On or about March 31, 1953, the Veterans Administration issued the subpoena duces tecum directed to respondent college which has led to the instant proceeding. Respondent has freely produced and made available to auditors of Veterans Administration all of its books and records for the period from February 1, 1950, onward. The Veterans Administration was informed that these books and records would be made available prior to the issuance of any subpoena duces tecum. This has been done, and as the Petition recites, an audit of those books and records by the Veterans Administration at the offices of respondent college is currently in progress.

Statutes and Regulations

The statutory provisions under which these proceedings are brought are:

Title 38, U.S.C.A. Sec. 131.

For the purposes of the laws administered by the Veterans' Administration, the Administrator of Veterans' Affairs, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have

the power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Administration. Any person required by such subpoena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States. [19]

Title 38, U.S.C.A. Sec. 133.

In case of disobedience to any such subpoena, the aid of any district court of the United States or the Supreme Court of the District of Columbia may be invoked in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which the inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any officer, agent, or employee of any corporation or to any other person, issue an order requiring such corporation or other person to appear or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

The regulation of the Veterans Administration dealing with the maintenance of records by educational institutions is as follows:

Educational institutions furnishing training to veterans under Part VII and Part VIII, as amended, will maintain records of progress and attendance of veterans in training and will make available such records and furnish such reports to the VA at such intervals as may be mutually determined and as may be necessary and required by VA to administer the training of veterans as required by the law. An institution of higher learning will not be expected to maintain for veteran-trainees records of attendance not normally maintained for other students. Educational institutions furnishing training to veterans under Part VII and Part VIII, as amended, will also maintain adequate financial records to support the claims for payment for veteran training, including financial reports required to substantiate tuition rates based upon cost data. Financial records, where required as above, will include but not be limited to the following—payroll ledgers, canceled checks, disbursement vouchers, invoices, general ledgers, journals, ledgers for cash receipts and cash disbursements, inventory records, records of accounts payable, and accounts receivable. The educational institution shall preserve in good condition all progress and attendance records and books of account pertaining to payments and contracts for veteran training for at least a period of three fiscal years following the actual date of submission of covering vouchers to the VA. The maintenance

of such records and books of account after the expiration of three fiscal years from the date of submission of the covering vouchers will not be required by [20] the VA, unless in specific cases their longer retention is requested by representatives of the General Accounting Office or the VA, in which event such records and books of account will be maintained until specific authorization exempts the institution from their further retention.

This regulation was promulgated September 6, 1951. [21]

* * *

Respectfully submitted,

STAHLMAN AND COOPER,

BLASE A. BONPANE,

SPENCER E. VAN DYKE, and

H. ALLEN SMITH,

By /s/ BLASE A. BONPANE,

Attorneys for Respondent. [29]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,

County of Los Angeles—ss.

Maren Elwood, being first duly sworn, deposes and says:

That she founded the Maren Elwood College, respondent herein, in September, 1923, in Los

Angeles, California, and that since that time she has been the Director thereof; that in the year 1948, said Maren Elwood College was incorporated under the laws of the state of California as a non-profit organization and has been and is now recognized as an institution of qualified grade authorized by the appropriate authorities of the state of California to issue undergraduate and postgraduate scholastic degrees.

That this affiant, Maren Elwood, Founder and Director of said College, was a faculty member of the University of California from 1934 to 1942, holds a degree of Master of Arts and has taken graduate work at London, Vienna, and Prague; that she is a member of the Authors' League of America and the Screen Writers Guild and is the author of several books published by Houghton-Mifflin of Boston, Massachusetts, and numerous stories, articles, and verses sold to Canadian, British and American magazines. [30]

The instructors of said College have at all times been approved by the California Department of Education as to the character of their education and training as a pre-requisite to teaching the subjects which they were assigned to instruct; that students of the College have subsequently been admitted to New York University, Southern Methodist University, Yale University and other outstanding institutions with full credit for courses taken at this College.

Affiant states that Maren Elwood College has had a continual contractual relationship with the Vet-

erans Administration, through the Administrator of Veteran Affairs, Washington, D. C., from on or about October, 1945, up to the present time, in reference to veteran students studying under the "G. I. Bill."

Affiant states that the demand made by the Administrator of Veteran Affairs, Veterans Administration, Washington, D. C., under the present order to show cause through the issuance of a subpoena duces tecum under date of March 31, 1953, that Maren Elwood College, a non-profit California corporation, produce at the office of said College, certain records of said College for the period of October 16, 1945, through January 31, 1953, is unreasonable, impracticable, contrary to regulations of the Veterans Administration, contrary to the policy of the law for such purposes made and provided, and places an unreasonable and oppressive burden upon said Maren Elwood College and the personnel of its staff. Said items so demanded by the Veterans Administration, on said subpoena duces tecum, consisting of five in number, are set forth in the petition for order filed by the Veterans Administration and on Page 2 thereof.

Affiant states that Veterans Administration claims that said records, emergency leave slips, transcripts of veteran students' grades, instructors' classroom books, individual veteran students' folders, containing papers, letters, authorizations, certificates [31] of eligibility, schedule of classes, award action and other matters are required in

connection with a pending audit by the Veterans Administration of the books and records of said College and that said audit shall include examination of all such records aforementioned commencing with October 16, 1945, and extending through January 31, 1953.

Affiant states that the Veterans Administration, through numerous representatives from the Regional Office in Los Angeles, California, has been advised that said College would permit the Veterans Administration to conduct the audit and full and complete examination of all those records and books within a period of three years commencing February, 1950, and terminating February, 1953, but that the Veterans Administration, through Mr. Watts, in charge of the Regional Finance office, refused to accede to said suggestion and stated that the audit must be conducted as theretofore demanded and that it would embrace the period commencing October 16, 1945, up to and including January 31, 1953.

Affiant states that throughout all of this period of time within which the audit is requested, namely October 16, 1945, to January 31, 1953, there has been no indication given to any of the officials of Maren Elwood College that there might be any necessity of keeping records and books in such order as to be available for such an audit that would extend back longer than a three-year period; that, to the contrary, all of the procedure that has been followed by the College in connection with its relationship with Veterans Administration in veteran

students' affairs has been in close compliance with the instructions, information, bulletins, letters and regulations periodically received by the College under its various contracts with the Veterans Administration.

Affiant states that the College has not only been continually subject to inspection and audit by the State Department of Education which controls curriculum and other aspects of schooling [32] and must approve all subjects and classroom schedules and the quality and nature of the studies, but also, since 1945, Maren Elwood College has actually been subjected to approximately ten so-called "spot checks" of all of its books and records, both by the representatives of the Department of Education, State of California, the representatives of the Veterans Administration, Washington, D. C., as well as by representatives of the General Accounting Office of the Federal Government; that commencing with April, 1951, through August, 1951, representatives of the General Accounting office of the Federal Government did, in fact, make an audit of the books and records of the College covering a three-year period from February 1, 1948, through February 1, 1951; that this audit was an audit made in due course, similar to other audits made at the time by the General Accounting Office of other schools and colleges in this community.

Affiant states that it should be noted that the aforementioned audit by the General Accounting Office covered solely and only a three-year period, and Maren Elwood College representatives were

given to understand at that time that this was all that the General Accounting Office felt that it was properly entitled to have; affiant says, moreover, that the General Accounting Office stated that it did not attempt to go back beyond the three-year period for the reason that the rules and regulations of the Veterans Administration relating to requirements for the keeping of books and records had been so uncertain and indefinite, up to that point, that an audit beyond the three-year period was utterly impracticable; that affiant, in this connection, calls attention to the fact that, to her knowledge, no regulation covering the keeping of books and records was issued by the Veterans Administration to schools and colleges until 1951.

Affiant states that commencing with the year 1945, and continuing periodically thereafter, numerous training officers whose [33] duties were to maintain close supervision on the veterans as to their class schedules, grades and attendance, made frequent, periodic visits to the college, attended classes with veterans in order to evaluate the veterans' progress and were provided with a room, by the college, in which to interview and discuss with the veteran each month, or weekly, any problems that might arise; this supervision was conducted over the years, in addition to the fact that for several years, once a month, five forms had to be filled out by the school and submitted to the Veterans Administration on all students, namely (1) VA Form 1905-B, training program and progress card;

(2) VA Form 1905-C, Trainees term schedule; (3) VA Form 1905-D, Instructors monthly report on training; (4) VA Form 7-1905B, School training program and progress report; and (5) School special printed forms outlining subjects, hours and cost of courses; that some of the training officers and their respective periods of duty were: (1) John Ketchum, November, 1945-November, 1946; (2) R. J. Brandt, October, 1946; (3) R. L. Huntington, February, 1946-November, 1947; (4) Henry H. Rempel, August, 1947; (5) E. S. Delaplane, December, 1947-December, 1948; (6) Henry C. Morse, August, 1947; (7) F. W. Stafne, January, 1947-July, 1947 (requested time clock be installed to keep work shop hours and this was done by the College); (8) Joseph Bradford, March, 1949; (9) Frank Zanoni, February, 1949-December, 1949; (10) G. H. Howell, March 26 and 27, 1951; (11) Mr. Hughes of General Accounting Office appeared with a crew of auditors April 17, 1951, audited all records from February 1, 1948, leaving the College in August of 1951; (12) Marvin D. Howell, April 1, 1952; (13) Dr. Beveridge inspected some of the academic student records, April 4, 1952; (14) John Pearson and Mr. Kidwell of the Veterans Administration Finance Department visited the College to make audit of records from October, 1945, to current date. This crew of men remained at the College from April 15th until [34] November 13, 1952, although the so-called 10% audit was not completed until February, 1953.

Affiant states that in some instances the Veterans Administration was at direct variance with State Department of Education on many of the issues that were discussed and directions and instructions that were given by the Veterans Administration; that, in one instance, Veterans Administration recommended the use of a time clock and time cards for veteran students, whereas the State Department of Education ordered the College to do away with time clocks and substitute another method; that in 1951, Veterans Administration requested that G. I. Students in part-time training should be cut off and that contrary thereto, the State Department of Education sent out a directive that if Veterans Administration cut off any part-time G. I. students from education, the responsibility would rest entirely on the Veterans Administration as part-time courses were automatically approved when full-time courses were approved.

Affiant states that the training officers, in each of their routine inspections, verified teachers' roll books, examined individual student files, program cards, attendance program and work shop progress in talks with work shop instructors, checked attendance records, visited classes, talked with teachers and carried on individual discussions with students in private; that, in addition to the Veterans Administration training officers, the Veterans Administration also sent out to the College, representatives from the Contract Section and the Voucher Audit section whose responsibility was to spot check veterans' conditions under the contract, in-

cluding attendance, class schedules and courses, and generally, to ascertain that the college was living up to its contractual obligations; that the College and all of its staff has on each occasion made every effort to cooperate to the very best of [35] its ability in following the instructions, criticisms, and suggestions and the procedures given by the Veterans Administration and the California State Department of Education.

Affiant states that, likewise, the California State Department of Education not only thoroughly checked the college curriculum and facilities for about one year prior to granting this college the State approval to operate under the "G. I. Bill of Rights," but caused routine visits to be made of the College by Miss Jean Campbell, technical assistant the California Director of Education, who made her first visit in September, 1946, and made visits thereafter as follows: March 30, 1947; September 25, 1947; November 7, 1947; September 16, 1948; October 22, 1948; December 7, 1948; December 30, 1948; March 22, 1949; January 13, 1950; September 12, 1950; on November 16, 1950, Miss Campbell was accompanied by David Slayton of Veterans Administration, Contract Section; February 7, 1951; October 3, 1951; October 17, 1951; and May 9, 1952.

Affiant states that upon the occasion of the appearance of John Pearson, auditor of the regional office of the Veterans Administration in Los Angeles in April of 1952, he demanded the production of all books and records commencing with October, 1945; that the College questioned the right of the

Veterans Administration to go back beyond a period of three years, pointing out further that all of the books and records were not available because the College had moved several times and some of the books and records had been lost and destroyed and that some of the records had not been completely kept in the early history of the relationship with the Veterans Administration because of the lack of knowledge and information and uncertainty of the requirements by the Veterans Administration in the earlier days; that these officials demanded production of all books and records insisting that if compliance of the College was not made, dire consequences would ensue; that the [36] Veterans Administration proceeded to conduct an audit which it called a 10% sampling of the books and records of the College; that upon completion of this audit, the representatives of the College were advised by the Veterans Administration representatives that "they were all through" with the books. This was in November, 1952. That thereafter two demands were made by Veterans Administration upon the College requiring it to sign a letter agreeing to a determination being made upon a 10% principle which would mean that any amount that the Veterans Administration found to be allegedly due and owing under the 10% sampling was to be multiplied by 10 to determine the ultimate figure that the Veterans Administration would demand from the College. That the College refused to sign either of said letters; that, thereupon, the Veterans Administration representatives

complained that this refusal would create a great upset and concern by their auditors and particularly on the part of Mr. M. W. Watts in charge of the Finance Section of the Regional Office; that said representatives resorted to statements, implications and innuendoes aimed at intimidating the College into signing the letter agreeing to the 10% formula. On February 12, 1953, came the first intimation of the amount that the Veterans Administration considered to be due it by a letter which Mr. Pearson handed to this affiant showing that over \$100,000.00 would be due if the 10% formula were applied; that on March 27, 1953, Mr. Pearson called at the college to make arrangements for the full 100% audit of the entire period from October, 1945, to the present time, and to secure appropriate space and facilities at the college for his crew of four auditors; he stated that if the college would sign the 10% letter, the Veterans Administration would be satisfied with only a 25% or, at most, a 50% audit; this was refused by the College and on March 31, 1953, the Veterans Administration crew started with the work of itemizing the records; thereupon Mr. Pearson left the premises and [37] later returned with Mr. Watts in the afternoon and demand was again made by Mr. Watts for all the records going back to 1945; that Mr. Pearson and Mr. Watts were advised by the College that the College would produce for audit purposes only the books and records commencing with February, 1950, provided that all important documents in the

folders would be receipted for; that Mr. Pearson refused to receipt for anything inside the folder but agreed to receipt for the folder itself; that, in an effort to cooperate, the College agreed to this demand and was put to the burden of having two school representatives analyze each folder and verify the contents thereof before turning them over to Veterans Administration; that notwithstanding this apparent understanding, on the afternoon of March 31, 1953, a subpoena duces tecum was served on the College demanding immediate production of all books and records from October 16, 1945, which demand was refused by the College except for the production of the books and records from February, 1950, which were held available for auditing; that thereupon Mr. Watts stopped the audit and pulled off his crew of auditors. That thereafter on April 1, 1953, Mr. Pearson returned with his crew of auditors; that the auditing thereupon was resumed, and has been in progress ever since, and said auditing is still going on with the crew at work at the College.

Affiant points out that the Veterans Administration alleges in its affidavit in support of its demand for order to show cause in this matter that it had requested the representatives of the College in April, 1952, to hold all books and records in the possession of the College at the time that it had commenced its audit in April of 1952. This affiant specifically denies that any such demand or indication was given and that therefore the only information or notification the College had to be guided

by was the aforementioned statement that had theretofore been made by the representatives of the Veterans Administration that "they were [38] all through" with the books and this was in November, 1952.

That the Veterans Administration further contends that since an audit was in process and since no final submission of the findings was made to the College other than the 10% sampling that this in itself is notice to the College representatives to retain all books and records. Affiant, in behalf of the College, denies that this constituted any notice whatsoever and moreover respectfully submits that the specific three-year period provided for in the one part of the regulations of the Veterans Administration, issued September 6, 1951, were reasonable, bearing in mind that there is no fraud involved in this matter and that there is no contention whatsoever in these proceedings of the existence of any fraud on the part of the College. That the Veterans Administration appears to rely upon that portion of the regulations of September 6, 1951, which authorizes Veterans Administration in specific cases to order the retention of books and records a longer period if a request therefor is made by representatives of the General Accounting Office or the Veterans Administration; but no such request was ever made by either of said agencies; moreover, such a provision authorizing the Veterans Administration to direct the retention of books and records beyond a three-year period is unreasonable, oppressive, and contrary to policy of the

law and places an unbearable burden upon the College staff; that said provision is invalid because it does not specify nor does it set up any method or procedure or any form of notice for the release of the parties from the rigors of this directive nor any limitation as to how far back the Veterans Administration may go, or how far in the future the books must be retained after the request to retain them shall have been made, and could well be a directive to hold the books forever.

Affiant further states that any order of the Court authorizing the Veterans Administration to make the audit that it is requesting [39] and any order upon the College requiring its staff to produce the books and other records under the subpoena duces tecum would put the college to a most burdensome expense and unnecessary waste of valuable time in an attempt to establish to the satisfaction of higher authorities or the courts that any monies allegedly claimed to be due to the Veterans Administration are, in fact, not due at all for the reason that it is even now apparent that the claim made by the Veterans Administration is based upon a strained interpretation of the curriculum and of the manner in which it has been fulfilled by the College, notwithstanding the fact that the operation of this and other phases of the procedure have been constantly under the scrutiny of all of the Federal and State agencies aforementioned throughout its entire contractual period. This the Veterans Administration is doing now after close to eight years of strict supervision and close inspec-

tion by its officials, representatives and training officers who have checked, if not weekly, at least monthly, the progress, the activities, the methods and all procedures followed by the college within the period that the order is sought to be made.

Affiant believes that certain representatives of the Veterans Administration have embarked upon a plan of harassment; that from time to time, students complain that disparaging and uncomplimentary criticisms of this College and unfavorable comments and remarks have been uttered in reference to this College by Veterans Administration representatives; that as late as June 18, 1953, a certain representative of the Veterans Administration who stated that his name was Pilcher came to the College requesting that a program be made for a student named McDonald; that his conduct at that time will be made the subject of another affidavit by one of the employees of the College; that said Pilcher manifested a very unfavorable attitude, looked at one of the brochures of the College and stated that this was propaganda which the College called a brochure. [40]

Affiant states that ever since the month of November, 1952, all payments due and payable to this College for G. I. students' tuition amounting to several thousands of dollars have been cut off although since that time, three semesters have intervened and student training has been furnished to veterans by this College without having received one cent in payment; that this shutting off of pay-

ments since November, 1952, was done abruptly and without any warning whatsoever.

/s/ MAREN ELWOOD.

Subscribed and sworn to before me this 23rd day of June, 1953.

[Seal] /s/ MARION HARVEY,
Notary Public in and for said
County and State. [41]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Estella V. Byrnes, being first duly sworn, deposes and says:

That she is now and has been since the month of July, 1949, the Comptroller of the Maren Elwood College, located at 4949 Hollywood Boulevard, Los Angeles, California.

That she has been connected with the Maren Elwood College since July of 1949; that she was present and participated in all of the discussions, meetings and conferences with the representatives of the Veterans Administration as of April, 1952, when demand was first made by them for production of all books and records to enable them to accomplish an audit for the Veterans Administration.

Affiant states that she has carefully read the affidavit executed by Maren Elwood, and that affiant desires to corroborate and support all of the statements therein set forth in connection with the activities therein mentioned from and after July, 1949, in connection with the supervision, [42] inspections, General Accounting Office audits, and all of the visits, proposals, counter-proposals, statements, and conferences occurring in April, 1952, and thereafter, relating to the demand by the Veterans Administration for the audit which is still in progress.

Affiant specifically states that within her knowledge no request was made by any representative of the Veterans Administration upon the College in April, 1952, or at any other time, to the effect that the College was to hold books and records in the possession of the College, or that any indication whatsoever had been given by any of the agents or representatives of the Veterans Administration that any books and records which were in possession of the College at the commencement of the audit were to be retained.

Affiant reasserts that she, having carefully read and examined all of the contents of the affidavit executed by Maren Elwood, now reaffirms the facts and statements set forth in said affidavit, except such statements which refer to events and activ-

ities occurring prior to the month of July, 1949, when this affiant first became connected with the College.

/s/ ESTELLA V. BYRNES.

Subscribed and sworn to before me this 25th day of June, 1953.

[Seal] /s/ MARION HARVEY,
Notary Public in and for Said
County and State. [43]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

Jeanne Davis, being first duly sworn, deposes and says:

That she is now and has been since the month of June, 1952, the Registrar of the Maren Elwood College, located at 4949 Hollywood Boulevard, Los Angeles, California.

That on the afternoon of June 19, 1953, after 1:00 p.m., one Mr. Pilcher, a training officer from the Veterans Administration, arrived at the Maren Elwood College to discuss with Miss Maren Elwood, the Director thereof, the matter of arranging a schedule for George McDonald, a veteran who has been trying to obtain a certificate of eligibility to attend the College under the G. I. Bill of Rights, and under Public Law 16; that while Mr. Pilcher, who was accompanied by Mr. McDonald, was wait-

ing in the front office to see Miss Elwood, Mr. Pilcher told affiant that the College would have to arrange a forty hour week schedule for Mr. McDonald, since the College was a training school; that [44] affiant answered that she had never heard of a forty hour week in connection with this College as this College was not a trade school as Mr. Pilcher had erroneously termed it but that it was an institution of higher learning.

Affiant states that thereupon Mr. Pilcher became quite argumentative and defiant asserting that the College was a trade school and was listed as such at the Veterans Administration. Affiant replied that he was in error and that full-time students of this College were obligated to attend the College only 25 hours a week to which Mr. Pilcher replied, that if that was the case it became necessary for the College to prove that students were getting sufficient work to occupy time for the additional fifteen hours of study, over the 25 hours spent in classes and work shop insisting that forty hours a week was the requirement. That this attitude of contemptuousness on the part of Mr. Pilcher continued even though he was told that his information was erroneous and that he should check with Miss Elwood who would be able to straighten him out.

Mr. Pilcher and Mr. McDonald, after having had their interview with Miss Elwood, left the building. That about twenty minutes thereafter, Mr. McDonald returned quite disturbed and stated to this affiant that he had been talking with Mr. Pilcher outside the building and, that Mr. Pilcher was quite

angry and remarked that the people at the College were so "high and mighty," and that the Veterans Administration hated to do business with them; also that the "propoganda" that the College called their brochure was very misleading. Affiant suggested that Mr. McDonald should have pointed out to Mr. Pilcher, that the brochure clearly states on Page 6, that the Maren Elwood Professional Writing School, is a four year college chartered by the State of California, with authority to grant degrees. That said Mr. McDonald, was obviously [45] greatly agitated over his discussion with Mr. Pilcher and the remarks he had made regarding the College and affiant commented to him that it appeared that some of these training officers from the Veterans Administration certainly were lacking in respect especially in their attitude toward Miss Elwood, the Director of the College, who is a woman of prominence and should not be treated as an upstart or a bobbysoxer, to which Mr. McDonald stated that Mr. Pilcher was very hot under the collar while in Miss Elwood's office, and that apparently he was new on the job and not very well informed.

/s/ JEANNE DAVIS.

Subscribed and sworn to before me this 25th day of June, 1953.

[Seal] /s/ MARION HARVEY,

Notary Public in and for Said
County and State.

Receipt of copy acknowledged.

[Endorsed]: Filed June 25, 1953. [46]

[Title of District Court and Cause.]

MEMORANDUM IN AID OF ORDER TO
SHOW CAUSE HERETOFORE ISSUED

The reply to the order to Show Cause herein discloses, that there is no substantial dispute with the facts as presented to the Court, in the Petition for the Order to Show Cause, except that the respondent Maren Elwood College, denies that an oral demand was made on April 14, 1952, by a representative of the Finance Division, Veterans Administration, Los Angeles Regional Office. However, it is reiterated as stated in the affidavit of John D. Pearson, Finance Accountant of the aforementioned Veterans Administration Regional Office Finance Division, that such demand was made at that time. Further reference is made to oral demand for the school's records for the period commencing October 16, 1945, as made by the aforementioned John D. Pearson and by M. W. Watts, Finance Officer, Veterans Administration Regional Office, Los Angeles, on March 31, 1953, as stated in the affidavits of Mr. Pearson and Mr. Watts, respectively, in support of the Petition for the Order to Show Cause. Reference is also made to the attached copy of letter dated February 20, 1953, from M. W. Watts to Maren Elwood, Director of Maren Elwood College, marked Exhibit "A." [48]

The Administrator of Veterans Affairs Had
Authority to Issue the Subpoena in This Proceeding

The subpoena authority of the Administrator of Veterans Affairs under Section 131 of Title 38, United States Code (Title III, Public Law No. 844, 74th Congress, 49 Stat. 2033), is applicable to cases of schools training veterans and billing the Veterans Administration for tuition for cost of books, supplies and equipment and is not limited to cases involving veterans' pension claims. Sections 131 through 134 of Title 38, United States Code, the subpoena statute under consideration, superseded and repealed a similar provision respecting subpoenas which had been enacted as Section 8, Public Law No. 242, 68th Congress, 43 Stat. 609, 38 United States Code 431, and which provided for the issuance by the Director of the Veterans' Bureau of subpoenas "upon any matter within the jurisdiction of the Bureau." That statute known as the World War Veterans' Act of 1924, vested in the Director of the United States Veterans' Bureau jurisdiction of many matters relating to veterans including, among others, compensation treatment, insurance and vocational rehabilitation and trading. The jurisdiction of the veterans Bureau with respect to vocational rehabilitation and training of veterans included authority to contract with schools and other training establishments. There was nothing in the aforementioned World War Veterans Act of 1924, to indicate that the term "jurisdiction," as used in the subpoena provision thereof, was intended to apply to only a particular segment of the Director's authority. Certainly, if any restriction of the subpoena authority had been con-

templated, it would have been a simple matter for Congress to so delineate the limits of the Director's authority.

The subpoena authority of the Administrator of Veterans Affairs and of persons to whom he delegates such authority applies to "any matter within the jurisdiction of the Administration," and includes the authority "to require the production of books, papers, documents, and other evidence * * *." The text of the subpoena statute in question, Section 300 of Public Law No. 844, 74 Congress (49 Stat. 2033, 38 U.S.C. 131), is as follows:

"Sec. 300. For the purposes of the laws administered by the Veterans Administration, the Administrator of Veterans Affairs, [49] and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Administration. Any person required by such subpoena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States." (Underscoring supplied.)

The term "jurisdiction" as used in the cited authorizing statute means the power to act in a certain situation and to administer programs and policies of the United States and embraces in this particular instance every function or responsibility specifically assigned to the Administrator of Veterans Affairs and every function and responsibility which is inherent in the administration of that agency. The duties and responsibilities of the Administrator of Veterans Affairs with respect to providing and making proper regulations for the training of veterans is provided for in Veterans Regulation No. 1 (a), Part VII, promulgated pursuant to Chapter 12, Title 38, United States Code. Reference is also made to Public Laws 16 and 346, 78th Congress. Transactions with schools training veterans are a "matter within the jurisdiction of the Administration." The Administrator of Veterans Affairs is thus required by statute to administer a program of education of certain able-bodied veterans and a program of vocational rehabilitation and training of disabled veterans. The responsibilities of the Administrator in connection with said program included inter alia the execution of contracts with training facilities, determinations as to whether any amounts have been paid by the Administration for services or articles not rendered or, in cases of fair and reasonable rates, similar determinations respecting amounts billed but not yet paid. An inherent [50] responsibility of the Administrator of Veterans Affairs with respect to expenditure of Government funds is

the duty to take all administrative steps to recover any amounts overpaid. His duties to the taxpayers regarding such funds include not only the task of ascertaining so far as is possible that all amounts disbursed pursuant to his direction are properly payable, but the responsibility of ascertaining any amounts which have been overpaid in the past and the taking of all administrative steps to recoup such overpayments.

The Congress of the United States has seen fit to vest in the Administrator of Veterans' Affairs broad subpoena authority respecting the development of the facts on matters within the province of the Veterans Administration and specifically provided for delegation of that authority. In this case an authorized official of the Veterans Administration has found that the indicated facts necessitate the development of a question of overpayments and he invoked the aforementioned statutory subpoena authority. In reply to the respondent's allegations which inject personalities into this case and claim improper motives in resorting to the subpoena, it must be said that the unassailable integrity of the United States Government demands a presumption that its officials act within the limits of their authority and that they will perform any investigation or inspection of records strictly in accordance with the statutory limits relating thereto.

The underlying Veterans Administration regulation involved in this proceeding is Veterans Admin-

istration Regulation No. 10672 (38 C.F.R. 21.672) which reads as follows:

Maintenance and Retention of Records and Reports
Veterans Administration Regulation 10672

Educational institutions furnishing training to veterans under part VII and part VIII, as amended, will maintain records of progress and attendance of veterans in training and will make available such records and furnish such reports to the V.A. at such intervals as may be mutually determined and as may be necessary and required by the V.A., to administer the training of veterans as required by the law. An institution of higher [51] learning will not be expected to maintain for veteran-trainees records of attendance not normally maintained for other students. Educational institutions furnishing training to veterans under part VII and part VIII, as amended, will also maintain adequate financial records required to substantiate tuition rates based upon cost data. Financial records, where required as above, will include but not be limited to the following—payroll ledgers, canceled checks, disbursement vouchers, invoices, general ledgers, journals, ledgers for cash receipts and cash disbursements, inventory records, records of accounts payable, and accounts receivable. The educational institution shall preserve in good condition all progress and attendance records and books of account pertaining to payments and contracts for veteran training for at least a period of three fiscal years following the actual date of submission of covering vouchers to the V.A. The

maintenance of such records and books of account after the expiration of three fiscal years from the date of submission of the covering vouchers will not be required by the V.A., unless in specific cases their longer retention is requested by representatives of the General Accounting Office or the V.A., in which event such records and books of account will be maintained until specific authorization exempts the institution from their further retention. (September 6, 1951.)

The Demand by the Veterans Administration for
Production of Records Commencing With
October 16, 1945, and the Subpoena Duces
Tecum Are Reasonable

The sole argument of the respondent in support of his contention that the subpoena duces tecum is unreasonable is the allegation that as much as eight and one-half years might be required for examination of its records commencing with October 16, 1945. This, apparently, is based upon the erroneous assumption that the Veterans Administration Finance Audit team spent all of [52] each day from April 14, 1952, to some time in November of 1952, in examination of the school's records. This, of course, is not true. Further, reference is made to the allegation of respondent that the Government's General Accounting Office recently completed an audit of its veterans training program for the period 1948 to 1951. In connection therewith it is pointed out that representatives of the General Accounting Office independently audited the records of the school for the

period of February, 1948, to February, 1949, and issued a report indicating an overpayment with respect to certain phases of the school's veterans training program and, in particular, the cost data submitted by the school. It was in connection with the General Accounting Office's report of findings that the Veterans Administration Finance and Auditing spent the first two months of its audit verifying the accuracy of the other agency's overpayment report.

No undue burden upon the school would result from compliance with the subpoena and the order to show cause herein. The examination of the school's records is proposed to be held at the school itself. No more than a pointing to the appropriate files, that is identifying the records, would be necessary on the part of the school personnel. As a matter of fact, it is its own refusal to comply with the request for the records covering the period between October, 1945, and February, 1950, which has, in itself, caused a substantial inconvenience to the school inasmuch as, by refusing to produce the requested records, it has been necessary for it to strip from each veteran's file all records for the period prior to February, 1950.

To sustain the necessity of examination of the requested records, it is not necessary that there be an allegation that the school practiced fraud in the keeping of its records. As a matter of fact, until the required examination has been made, it will be presumptions on the part of anyone to say that there was fraud. An allegation as to whether or not fraud

was practiced must, of necessity, await completion of an audit of all the school's records in so far as they pertain to the veterans training program. Until such time as the audit has been completed, it cannot be said with any degree of certainty what irregularities will be shown in the final analysis and how much was, in fact, [53] overpaid to the school. It may be said at this time that on or about February 10, 1953, Mr. Pearson verbally advised Miss Elwood, the director of Maren Elwood College, that as of that date the categories of overpayment to the school appeared to be as follows:

- (a) Billings for tuition prior to first day of attendance;
- (b) Billings for tuition subsequent to last day of attendance;
- (c) Billings for tuition during periods of excessive absence;
- (d) Billings for tuition during periods of "holidays" not authorized by contract;
- (e) Billings for tuition in excess of contract limitations;
- (f) Billings for tuition where computation by the school was incorrect;
- (g) Billings for tuition on unauthorized subjects;
- (h) Billings for tuition that resulted in duplicate payments;
- (i) Billings for tuition during periods of non-attendance in school classes;
- (j) Billings for tuition that represented excess workshop hours;

(k) Billings for tuition that represented unauthorized subject hours;

(l) Billings for tuition that represented concurrent classes (dual attendance);

(m) Billings for four unauthorized fees.

The Request of the Veterans Administration for Production of Records Commencing With October, 1945, was Authorized by Veterans Administration Regulation and by Contract Between the School and the Veterans Administration.

The Veterans Administration Regulation 10672 (38 C.F.R. 21.672), as above quoted, is the administrative regulatory authority supporting the request for production of the school's records for the period commencing with October, 1945. The provisions of the regulation were incorporated in the two last contracts between the school and the Veterans Administration, to wit, Contract No. V 3044 V-1099 and Contract No. V 3044 V-1225, covering the inclusive periods [54] of February 2, 1952, to January 29, 1954. A part of each of said contracts (Veterans Administration Form 7-1903) was Veterans Administration Form 7-1986, paragraph 6 b of which reads as follows:

b. The contractor agrees to maintain records of progress and attendance of veterans in training, and to make available such records and furnish such reports to the Veterans Administration at such intervals as may be mutually determined and as may be necessary and required by the Veterans

Administration to administer the training of veterans as required by law. The contractor further agrees to preserve in good condition and have available at all times for inspection by representatives of the Veterans Administration all original and related records of student attendance and absence and financial records which support claims for payment for veteran training, including financial records required to substantiate tuition rates based upon cost data, for a period of (3) three fiscal years following the actual date of submission of covering vouchers to the Veterans Administration. Such financial records will include, but not be limited to the following: Payroll ledgers, cancelled checks, disbursement vouchers, invoices, general ledgers, journals, ledgers for cash receipts and cash disbursements, inventory records and records of accounts payable and accounts receivable. In the event the contractor is so notified by the Veterans Administration, the above-specified records will be maintained for such further length of time in addition to three (3) fiscal years until specific authorization exempts the institution from this further retention. Notwithstanding the above provisions, where the Contractor makes and retains microfilms of the receipts taken for books, supplies and equipment furnished to veteran trainees which pertain to this contract, the Contractor as an alternate procedure may immediately destroy such receipts as have been microfilmed, provided such microfilm records will be kept available for the inspection of the Veterans Administration. [55]

Although neither the regulation nor the contract provision require that the school preserve its records pertaining to payments and contracts for veteran training beyond three fiscal years following the actual date of submission of covering vouchers to the Veterans Administration, the school is required to maintain and keep the records for such prior period in those cases where such longer retention is requested by representatives of the Veterans Administration. There appears to be no ambiguity in either the regulation or the contract. Inasmuch as the records for the period prior to February, 1950, were in existence, exhibited to representatives of the Veterans Administration on and after April 14, 1952, and demand made by representatives of the Veterans Administration on April 14, 1952, that said records be maintained and preserved for further inspection and examination by the Veterans Administration and until other disposition was authorized by the Veterans Administration, the issuance of the subpoena in question was proper upon the refusal thereafter of the school to produce said records. For the same reason, the Order to Show Cause herein in aid of the subpoena was properly issued.

The Court Had Jurisdiction to Issue Its
Order to Show Cause Herein.

The issuance of the Court's Order to Show Cause was authorized by Section 302, Public Law No. 844, 74th Congress (49 Stat. 2033; 38 U.S.C.A. 133). That statute provides that "the aid of any District

Court of the United States * * * may be invoked in requiring the attendance and testimony of witnesses and the production of documentary evidence * * *'' (Underscoring supplied.) The underscored words are a sufficient answer to the respondent's contention that the authority of this Court is limited merely to require the production of a witness rather than the production of documents. Nor is there anything ambiguous, indefinite or uncertain with respect to the documents, records, etc., of the school which it is sought to be examined.

With respect to the allegations contained in the Affidavit of Jean Davis, attached to the reply of Maren Elwood College, no information thereon from the Veterans Administration is presently available inasmuch as its employee, [56] Mr. Pilcher, referred to in said affidavit, is presently on annual leave. In any event, it does not appear that the facts and circumstances complained of in said affidavit are relevant to the single issue in this case.

Respectfully submitted,

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Asst. United States Attorney,
Chief of Civil Division;

/s/ ARLINE MARTIN,
Asst. United States Attorney,
Attorneys for Petitioner. [57]

EXHIBIT A

(Copy)

February 20, 1953.

3044-4AF

Registered Mail

Maren Elwood, Director,
Maren Elwood College,
4949 Hollywood Boulevard,
Los Angeles, California.

Dear Miss Elwood:

Reference is made to conference held in this office with yourself, Mrs. Byrnes, John D. Pearson and the undersigned in attendance.

One of the main points discussed at this conference covered the responsibility of your school to make available for representatives of the Veterans Administration all records pertaining to the Public Law 16 and 346 training from the beginning of the program at your school. V.A. Regulations specifically state that all records will be available for V. A. inspection.

It is requested that you make available to the Finance Accountant in charge of the audit of your school all records concerning the veterans training program and which were utilized as substantiation for the voucher certifications for the period October 16, 1945, to January 31, 1953. These records generally consist of individual veteran files, book and supply issue records, your purchase invoices of books and supplies, class attendance records, work-

shop attendance records, records of class schedules, progress records, records of credits earned and all your general books of account.

Your full cooperation will be appreciated.

Very truly yours,

M. W. WATTS,
Finance Officer.

JDP:nk:ja

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 1, 1953. [58]

[Title of District Court and Cause.]

AFFIDAVIT SUPPLEMENTING MEMORAN-
DUM IN AID OF ORDER TO SHOW
CAUSE

State of California,
County of Los Angeles—ss.

H. M. Webster, being duly sworn, deposes and says:

That he is the Chief of the Vocational Rehabilitation and Education Division of the Veterans Administration Regional Office, Los Angeles, California.

That Maren Elwood College is not, for Veterans Administration purposes, an institution of higher learning as claimed in its reply. To be recognized, for Veterans Administration purposes, as an insti-

tution of higher learning, a school must have been accredited as such by one of certain recognized national or regional accrediting associations (i.e., Association of American Universities, Western College Association, American Association of Teachers' Colleges, American Bar Association, American Medical Association etc., to name a few) or it must have furnished the Veterans Administration with letters from three (3) duly accredited institutions of higher learning each certifying that it accepts the school's credits at full value and without necessity of examination of the students credited.

Maren Elwood College has not furnished the Veterans Administration [60] with any proof that it has complied with either of the foregoing prerequisites to its being recognized by it as an institution of higher learning, nor has it submitted any evidence that it has ever attempted to meet either requirement.

It is doubtful whether Maren Elwood College is recognized for any purpose as an institution of higher learning inasmuch as it is not listed as such in the 1952-1953 Education Directory—Higher Education, Part III (a directory of institutions of higher learning in the United States), compiled by the Federal Security Agency, Office of Education,

and published by the United States Government
Printing Office.

/s/ H. M. WEBSTER.

Subscribed and sworn to before me this 7th day
of July, 1953.

[Seal] /s/ MARY MARCIE,

Notary Public, Los Angeles
County.

My Commission expires July 28, 1956.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 8, 1953. [61]

[Title of District Court and Cause.]

Minutes of the Court—July 13, 1953

Present: The Hon. Wm. C. Mathes,
District Judge.

Proceedings.

For hearing on order to show cause directed to
Maren Elwood College.

It is Ordered that petition is denied without
prejudice and Order to Show Cause is discharged;
counsel for said College to prepare findings and
conclusions and order.

EDMUND L. SMITH,
Clerk;

By P. D. HOOSER,
Deputy Clerk. [63]

In the United States District Court in and for the
Southern District of California, Central Division

No. 15445-WM-Civil

In the Matter of:

MAREN ELWOOD COLLEGE

FINDINGS OF FACT AND CONCLUSIONS
OF LAW, AND ORDER

This cause came on regularly for hearing on July 13, 1953, before the Honorable William C. Mathes, United States District Judge, on the Order to Show Cause issued pursuant to the Petition for Order to Require Production of Documents filed by the Veterans Administration, and supporting affidavits having been filed in connection with said Petition, and Respondent, Maren Elwood College, having filed its Reply to said Order to Show Cause, together with affidavits in support of said Reply, and the Veterans Administration having filed a Memorandum in Aid of Order to Show Cause, and the Petitioner being present and represented by its counsel, Walter S. Binns, United States Attorney for the Southern District of California; Clyde C. Downing and Arline Martin, Assistant United States Attorneys, and Respondent Maren Elwood College being present and represented by its counsel, Stahlman and Cooper, and Blase A. Bonpane, Spencer E. Van Dyke and H. Allen Smith, and Tobias G. Klinger, and the Court having [64] read and examined the pleadings, docu-

ments and affidavits filed herein and having heard the argument of counsel, and being fully advised in the premises, and upon due consideration thereof, now makes the following findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, and makes the following Order:

Findings of Fact

I.

Respondent, Maren Elwood College, was established in 1923 for the giving of instruction and training in writing, and has been in continuous operation ever since. Respondent was incorporated under the laws of the State of California in 1948 as a non-profit organization and has been recognized by the appropriate authorities of the State of California as an institution of collegiate grade qualified to issue a degree. Respondent has had a continual contractual relationship with the Veterans Administration, Petitioner herein, from October, 1945, to date, pursuant to which eligible veterans of World War II have been studying and taking courses of instruction at respondent college under the terms of the so-called G. I. Bill of Rights (Public Laws 16 and 346, 78th Congress).

II.

On March 31, 1953, the Veterans Administration issued and caused to be served upon respondent college a subpoena duces tecum commanding the production forthwith at the offices of Respondent

all of the records of said college for the period of October 16, 1945, through January 31, 1953, described and designated as follows:

(1) All Instructor Class Record Books, including Workshop and Study Halls, for the period 10/16/45 through 1/31/53. [65]

(2) All monthly recap of attendance records—central office records—for the period 10/16/45 through 1/31/53.

(3) All emergency leave slips for veteran students for the period 12/1/49 through 1/31/53.

(4) All transcript of veteran student grades for the period 10/16/45 through 1/31/53.

(5) All individual veteran student folders, containing school retained copies of Veterans Administration documents consisting of award action, letters of authorization, certificates of eligibility, students individual schedules of classes, and correspondence by and between the veteran, the school, and the Veterans Administration.

III.

Respondent college refused to comply with the terms of said subpoena duces tecum, but has made available for inspection and audit all of the pertinent books, documents and records of said college for three fiscal years preceding the date of said subpoena, and an audit of said books and records by the Veterans Administration is presently in progress.

IV.

On September 6, 1951, the Veterans Administration promulgated the following regulation dealing

with the maintenance and retention of records by institutions such as respondent college (38 C.F.R. 21.672):

Maintenance and Retention of
Records and Reports

Veterans Administration Regulation 10672

Educational institutions furnishing training to veterans under part VII and part VIII, as amended, will maintain records of progress and attendance of veterans [66] in training and will make available such records and furnish such reports to the V. A. at such intervals as may be mutually determined and as may be necessary and required by the V. A. to administer the training of veterans as required by the law. An institution of higher learning will not be expected to maintain for veteran-trainees records of attendance not normally maintained for other students. Educational institutions furnishing training to veterans under part VII and part VIII, as amended, will also maintain adequate financial records required to substantiate tuition rates based upon cost data. Financial records, where required as above, will include but not be limited to the following—payroll ledgers, canceled checks, disbursement vouchers, invoices, general ledgers, journals, ledgers for cash receipts and cash disbursements, inventory records, records of accounts payable, and accounts receivable. The educational institution shall preserve in good condition all progress and attendance records and books of ac-

count pertaining to payments and contracts for veteran training for at least a period of three fiscal years following the actual date of submission of covering vouchers to the V. A. The maintenance of such records and books of account after the expiration of three fiscal years from the date of submission of the covering vouchers will not be required by the V. A., unless in specific cases their longer retention is requested by representatives of the General Accounting Office or the V. A., in which event such records and books of account will be maintained until specific authorization exempts the institution from their further retention. [67]

This is the first and only regulation of the Veterans Administration dealing with the maintenance and retention of books, records and reports by institutions in the position of respondent college.

V.

The provisions of the aforesaid regulation were incorporated only in the two last contracts between respondent college and the Veterans Administration, to wit, Contract No. V 3044 V-1099 and Contract No. V 3044 V-1225 covering only the inclusive periods of February 2, 1952, to January 29, 1954. A part of each of said contracts (Veterans Administration Form 7-1903) was Veterans Administration Form 7-1986, paragraph 6b of which reads as follows:

b. The contractor agrees to maintain records of progress and attendance of veterans in training, and to make available such records and furnish

such reports to the Veterans Administration at such intervals as may be mutually determined and as may be necessary and required by the Veterans Administration to administer the training of veterans as required by law. The contractor further agrees to preserve in good condition and have available at all times for inspection by representatives of the Veterans Administration all original and related records of student attendance and absence and financial records which support claims for payment for veteran training, including financial records required to substantiate tuition rates based upon cost data, for a period of (3) three fiscal years following the actual date of submission of covering vouchers to the Veterans Administration. Such financial records will include, but not be limited to the following: Payroll ledgers, cancelled checks, [68] disbursement vouchers, invoices, general ledgers, journals, ledgers for cash receipts and cash disbursements, inventory records and records of accounts payable and accounts receivable. In the event the contractor is so notified by the Veterans Administration, the above-specified records will be maintained for such further length of time in addition to three (3) fiscal years until specific authorization exempts the institution from this further retention. Notwithstanding the above provisions, where the Contractor makes and retains microfilms of the receipts taken for books, supplies and equipment furnished to veteran trainees which pertain to this contract, the Contractor as an alternate procedure may immediately destroy such re-

ceipts as have been microfilmed, provided such microfilm records will be kept available for the inspection of the Veterans Administration.

VI.

No request was made by the Veterans Administration prior to February 20, 1953, that respondent college maintain and preserve the records described in Veterans Administration Regulation 10672 of September 6, 1951 (38 C.F.R. 21.672).

VII.

On February 20, 1953, the Veterans Administration sent the following letter by registered mail to respondent college:

February 20, 1953.

Registered Mail

Maren Elwood, Director,
Maren Elwood College,
4949 Hollywood Boulevard,
Los Angeles, California. [69]

Dear Miss Elwood:

Reference is made to conference held in this office with yourself, Mrs. Byrnes, John D. Pearson and the undersigned in attendance.

One of the main points discussed at this conference covered the responsibility of your school to make available for representatives of the Veterans Administration all records pertaining to the Public Law 16 and 346 training from the beginning of the program at your school. V. A. Regulations speci-

fically state that all records will be available for V. A. inspection.

It is requested that you make available to the Finance Accountant in charge of the audit of your school all records concerning the veterans training program and which were utilized as substantiation for the voucher certifications for the period October 16, 1945, to January 31, 1953. These records generally consist of individual veteran files, book and supply issue records, your purchase invoices of books and supplies, class attendance records, workshop attendance records, records of class schedules, progress records, records of credits earned and all your general books of account.

Your full cooperation will be appreciated.

Very truly yours,

M. W. WATTS,
Finance Officer.

JDP:nk:ja

Conclusions of Law

I.

In accordance with Veterans Administration Regulation 10672 (38 C.F.R. 21.672) respondent college has been required [70] only since September 6, 1951, to maintain and preserve the records described in said Regulation pertaining to any voucher submitted by respondent college to the Veterans Administration for a period of three fiscal years following the date of submission of such voucher, and in the absence of an appropriate request by the Veterans Administration for their

longer retention, the Veterans Administration may compel the production of only such records for investigation and audit pursuant to Sections 131 and 133, Title 38, U.S.C.A.

II.

Veterans Administration Regulation 10672 (38 C.F.R. 21.672) does not operate retroactively, but is entirely prospective in its application; a request made by the Veterans Administration pursuant to said Regulation that an educational institution maintain its records for longer than three fiscal years does not require such institution to maintain all records which it may have in its possession, nor permit the Veterans Administration to compel the production for investigation and audit of all records which such educational institution may have in its possession; such request relates only to the records of the institution which such institution is required to maintain under the terms of Veterans Administration Regulation 10672 (38 C.F.R. 21.672) and requires their maintenance and preservation for such additional period of time as may reasonably be necessary for their investigation and audit.

III.

The letter of February 20, 1953, from the Veterans Administration to respondent college does not constitute an appropriate request for the longer retention of records within the terms of Veterans Administration Regulation 10672 (38 C.F.R. 21.672). [71]

IV.

The provisions of Sections 131 and 133, Title 38,

U.S.C.A., relating to the production of books, papers, records and other documentary evidence or material for investigation or audit are limited by the terms of Veterans Administration Regulation 10672 (38 C.F.R. 21.672) with respect to the books, papers, records, and documentary evidence and material described in said Regulation.

V.

The subpoena duces tecum issued by the Veterans Administration and served upon respondent college on March 31, 1953, requires the production of records beyond the period for which such records may be required to be produced by the Veterans Administration, exceeds the lawful authority of the Veterans Administration, and is null and void.

VI.

The Petition for Order to Require Production of Documents filed by the Veterans Administration herein should be denied and the Order to Show Cause issued pursuant to said Petition discharged.

ORDER

The above matter coming on for hearing on the 13th day of July, 1953, Walter S. Binns, United States Attorney for the Southern District of California; Clyde C. Downing and Arline Martin, Assistant United States Attorneys, appearing on behalf of the Veterans Administration, Petitioner herein, and Stahlman and Cooper, Blase A. Bonpane, Spencer E. Van Dyke, H. Allen Smith and

Tobias G. Klinger, appearing on behalf of Maren Elwood College, Respondent herein, and the Court being fully advised in the premises, in accordance with the Findings of Fact and Conclusions of Law herein,

It is Hereby Ordered that the Petition for Order to Require Production of Documents be, and hereby is, denied without [72] prejudice, and the Order to Show Cause issued pursuant to said Petition be, and hereby is, discharged.

Dated this 31st of July, 1953.

/s/ WM. C. MATHES,
United States District Judge.

Receipt of copy acknowledged.

Lodged July 24, 1953.

[Endorsed]: Filed July 31, 1953.

Docketed and entered August 3, 1953. [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the Petitioner in the above-entitled action hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Findings, Conclusions and Judgment

in the above action, filed and entered on August 3, 1953, in favor of Respondent, Maren Elwood College.

Dated: August 5th, 1953.

LAUGHLIN E. WATERS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

ARLINE MARTIN,
Assistant U. S. Attorney;

By /s/ ARLINE MARTIN,
Attorneys for Petitioner.

AM:JW

[Endorsed]: Filed August 5, 1953. [74]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO DOCKET APPEAL

Good Cause Appearing Therefor, the time within which to docket the above-entitled appeal in the Court of Appeals is hereby extended to and including November 2, 1953.

Dated August 26, 1953.

/s/ BEN HARRISON,
United States District Judge.

[Endorsed]: Filed August 26, 1953. [77]

In the United States District Court, Southern
District of California, Central Division

No. 15445-WM—Civil

In the Matter of:

MAREN ELWOOD COLLEGE

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

WALTER S. BINNS,
United States Attorney, by
ARLINE MARTIN,
Assistant U. S. Attorney.

For the Defendant:

TOBIAS G. KLINGER, ESQ.

Monday, July 13, 1953—10:00 A.M.

(Hearing of order to show cause directed to
Maren Elwood College.)

The Court: I will hear from the Government in this matter. I have read everything that has been filed, so you won't need to go into those matters.

I am inclined to the view that, as a matter of right under the regulations, the Administrator is not entitled to require this college to maintain records for the three years back. As to those records,

once they are maintained, the regulations permit an order that they may be preserved. But we are confronted here with the regulations which were not promulgated until 1951 and an attempt to use the power under that regulation to compel the production and the preservation of records dating back to 1945.

I am not referring to what the situation would be, of course, if the Administrator just filed a suit against this college to recover alleged overpayments. Of course, then all the discovery powers and production powers under the rules would come into play. But here we are dealing with this limited statute.

Miss Martin: Since in their affidavits and the return they have not alleged that the records are destroyed and that they do not exist prior to three years—— [2*]

The Court: I will assume that they are all out there, they are present.

Miss Martin: Yes. On that assumption, I think that we do not need to talk further about whether or not they are required to preserve them after the three years. The right that arises here is a right to inspect records which exist. I do not think there is any three-year limitation on that right.

The Court: It is implicit in the entire regulation, isn't it?

Miss Martin: I do not think your Honor has to imply from the fact that they are only required to

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

preserve them for three years, that if they do preserve them for a longer period, that that limits the inspection of whatever documents they have preserved.

The Court: What would be the basis of authority to inspect them beyond that point?

Miss Martin: The authority contained in the statute, which says that they have—well, in our memorandum, on page 2, we quote from Section 300:

“For the purposes of the laws administered by the Veterans Administration, * * * shall have the power to issue subpoenas for and compel the attendance of witnesses,”

etc. [3]

“and to make investigations and examine witnesses upon any matter within the jurisdiction of the Administration. * * *”

The whole business of the school since 1945 has been conducted upon monies advanced by the Administration because of this program, so that all of that matter certainly is within the jurisdiction of the Veterans Administration. And it would seem to me that that section empowers an inspection of anything within the jurisdiction of the Administration, and the limitation upon preservation might protect them if the records had been destroyed, from having any adverse effect.

The Court: But the contract itself which you quote and the regulations of the Administrator, himself, apply only to a three-year period.

Miss Martin: As to the preservation of the records.

The Court: Yes.

Miss Martin: But that does not limit, it seems to me, that power to inspect records which do admittedly exist within that three-year period. That, it seems to me, is a different subject.

The Court: Then according to that, in 1960, if some school was diligent enough to keep the records, and some accountant wanted to project a 10 per cent audit and multiply it by 10, and the person did not want to do it, then the [4] Administrator could demand an audit for 15 years of those records.

Miss Martin: Well, I think that the Administrator——

The Court: It is not a question of being inconvenienced or anything of that sort. It is the question of the right of any concern to have some privacy of its papers.

Miss Martin: But this, your Honor, is a business in which the Government is, in a sense—well, the Government is directly interested because it provides the payments for the tuition.

The Court: Yes. If the Government had not limited its rights both by contract and by regulation—more important is by the regulation—there might be some basis for the argument. It seems to me if the Government wants to go into these records beyond that three-year period and thinks it has a lawsuit against this college, the Government should sue them and proceed like any other litigant.

But this thing of bludgeoning people, this generation may go down in history as the dictatorship of the accountants. They move in like a swarm of bees on business people, without notice, and demand this, demand that. There should be limitations upon it.

It is perfectly apparent here to me that this proceeding is brought because of the attempt by an accountant to say we found, by sampling 10 per cent, that such and such is true. Now, go along with us and just multiply it by 10, and [5] you pay the Government 10 times what we found and everything will be lovely. That is very close to moral laxity.

Miss Martin: It seems to me, your Honor, that the subpoena here makes it very clear that that is exactly what they do not want to do. They want to make an audit and find out what the amount is.

The Court: All right. They have made a sample, and if the Government is honest in its position that this college owes 10 times what the sample shows, why doesn't the Government sue the college like any other litigant?

Miss Martin: Well, it seems to me, your Honor, that it would be a much better thing to make the audit and handle it administratively, rather than coming into court where it may not desire and if the parties can get together probably.

The Court: But the citizen does not want that. He says: I am entitled to be protected in the privacy of my papers, not have Government auditors in there pawing over all my records all the time.

Yes, it might be more practical. Benevolent dictatorships are very practical, too. This citizen or this concern does not want that. They are willing to stand a suit rather than to have it done, and the Government may be right. I am not suggesting that there have not been overpayments. I do not know anything about those things, of course. But here is a question of method and the Administrator, by his own [6] interpretation, is limited to a three-year period. He has made his own limitation by his own interpretation of the statute as applied to this type of thing, this type of undertaking. I can see a very good reason for it, considering all the data that is required to be kept.

Miss Martin: Well, we did not conceive that the limitation of three years as to how the records should be kept limited the right of inspection under the general section 200 as to matters within their jurisdiction. I had always conceived that it was not a very good thing to do, to project an imaginary figure, to file a suit.

The Court: The Government has asked this contractor, this college, to accept it. That is what caused all this trouble. It seems to me it is perfectly apparent from the affidavits that if the college had been willing to go along and accept as true 10 times an imaginary 10, or an imaginary 10 times a 10, we would not be here.

Miss Martin: Of course, the contract which you referred to—and I was just looking at a provision of it in page 8 of our memorandum—while it contains the requirement of keeping the records for a

period of three fiscal years, it states: "In the event the contractor is so notified by the Veterans Administration, the above-specified records will be maintained for such further length of time in addition to three fiscal years." [7]

The Court: It did not say three years backwards. It says three years forward, doesn't it? And the preservation is not to be backward; it is forward. It is not retroactively; it is progressive prospectively.

Another thing, the idea of predicating such an important matter as that upon an oral say-so. Here are accountants, men who are trained in the meticulous art of keeping records so that everything will be beyond dispute, and they come in and say that they orally told these people to keep records beyond a certain time or orally told them to do something. It is certainly out of character with the training of accountants to do such an important thing as that purely by word of mouth.

Miss Martin: I have no answer to that.

The Court: The Government is not without remedy. The petition of April 30, 1953, will be denied; the order to show cause discharged. The petition will be denied without prejudice to some future application if the Government is so advised.

I will ask counsel for the College to prepare and settle under the local rules, and submit within five days, findings of fact, conclusions of law, and an order embodying the ruling made here this morning.

Mr. Klinger: I will do that, your Honor. Thank you. [8]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of July, 1953.

/s/ ALBERT H. BARGION,
Official Reporter.

[Endorsed]: Filed November 9, 1953. [9]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 77, inclusive, contain the original Petition for Order to Require Production of Documents; Order to Show Cause; Reply of Maren Elwood College to Order to Show Cause and Supporting Affidavits; Memorandum in Aid of Order to Show Cause Heretofore Issued; Affidavit Supplementing Memorandum in Aid of Order to Show

Cause; Minutes of the Court for July 13, 1953; Findings of Fact and Conclusions of Law and Order; Notice of Appeal; Appellant's Designation of Record on Appeal and Order Extending Time to Docket Appeal, which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 29th day of September, A.D. 1953.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14057. United States Court of Appeals for the Ninth Circuit. L. C. Chapman, Manager of the Regional Office of the Veterans Administration, Appellant, vs. Maren Elwood College, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 30, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14057

In the Matter of:

MAREN ELWOOD COLLEGE.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The United States of America, appellant, states that the points on which it intends to rely are as follows:

1. The district court in interpreting the statutory authority of the Veterans Administration to issue and procure the enforcement of a subpoena duces tecum erred by circumscribing that authority with alleged implied restrictions contained in Veterans Administration Regulation 10672 relating to compulsory record retention.

2. The district court erred in basing, in part, its denial of enforcement of the Veterans Administration subpoena duces tecum on the irrelevant grounds that the Government could utilize another remedy, and that the College would be subject to harassment were the subpoena remedy to be utilized.

3. The district court erred in denying the Veterans Administration's Petition for an Order to Require Production of Documents.

/s/ PAUL A. SWEENEY,

Attorney, Dept. of Justice,
Attorney for Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed October 24, 1953.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD
TO BE PRINTED

The United States of America, Appellant in the above-entitled action, hereby designates the following parts of the record to be printed and requests that the Clerk print the same:

1. The entire record in the District Court, including the pleadings, affidavits, motions, orders, transcript of the hearing on the Petition for an Order to Require Production of Documents on July 13, all exhibits, findings of fact, conclusions of law, order, and notice of appeal.
2. Designation of Record on Appeal.
3. Statement of Points on Which Appellant Intends to Rely.
4. This Designation of Parts of the Record to Be Printed.

/s/ PAUL A. SWEENEY,
Attorney, Dept. of Justice,
Attorney for Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed October 24, 1953.

No. 14057

**In the United States Court of Appeals
for the Ninth Circuit**

**L. C. CHAPMAN, MANAGER OF THE REGIONAL OFFICE OF
THE VETERANS' ADMINISTRATION, APPELLANT**

v.

MAREN ELWOOD COLLEGE, APPELLEE

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

BRIEF FOR APPELLANT

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FILED

DEC 20 1953

PAUL P. CARRAN

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14057

**L. C. CHAPMAN, MANAGER OF THE REGIONAL OFFICE OF
THE VETERANS' ADMINISTRATION, APPELLANT**

v.

MAREN ELWOOD COLLEGE, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The Manager of the Regional Office of the Veterans' Administration, Los Angeles, California, petitioned for an Order to Require Production of Documents in the United States District Court, Southern District of California, Central Division, pursuant to 38 U. S. C. 131, 133 (R. 3-9). From a denial of the petition, entered by that Court on August 3, 1953 (R. 72), the Manager of the Regional Office has appealed (R. 72-73). The jurisdiction of this Court rests upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

On April 14, 1952 the Veterans' Administration commenced an audit of the records of the Maren Elwood College, a nonprofit organization incorporated under the laws of California, at the college's principal office in Los Angeles, California (R. 6). The audit was to cover the period from October 16, 1945, to date and was made pursuant to Public Law 16, 78th Cong., 57 Stat. 43, and Public Law 346, 78th Cong., 58 Stat. 287 (hereinafter referred to as Public Laws 16 and 346), 38 U. S. C. 701 (b) (R. 12).

Upon commencement of the audit the head of the audit team requested and received from the proper college authorities the college's records covering the period under examination and informed those authorities that in accordance with its contract with the college and pertinent Veterans' Administration regulations, the records were not to be removed from the college or otherwise disposed of during the course of the audit until further notice from the Veterans' Administration (R. 12). In November 1952, it began to appear that certain improper billings by the college had resulted in overpayments to it by the Veterans' Administration during a period beginning in October 1945 (R. 12-13). After auditing about 10% of the records a substantial total overpayment seemed evident to the auditors (R. 13). The Veterans' Administration requested the consent of the college to project the 10% audit by multiplying the present figures by 10, so as to establish the total overpayment, rather than make the necessary 100% audit (R. 13).

The college failed to consent to the above procedure thus making a 100% audit necessary to determine the total overpayment (R. 13). However, upon resumption of the audit the college refused to turn over to the auditors its records prior to January 1, 1950. There was no contention on the part of college authorities that the college no longer possessed the records sought (R. 7, 13, 16).

To compel production of those records, on March 31, 1953, a subpoena *duces tecum* was served upon the college pursuant to the authority conferred on the Administrator of Veterans' Affairs under 49 Stat. 2033, § 300, 38 U. S. C. 131 (R. 15).¹ This subpoena was ignored by the college (R. 13). Thereupon the designated regional officer of the Veterans' Administration petitioned for an Order to Require Production of Documents in the United States District Court, Southern District of California, Central Division pursuant to 49 Stat. 2033, § 302, 38 U. S. C. 133 (R. 3-9). That Court denied the request for enforcement of the subpoena which was served on the college (R. 72). The Court held that the subpoena *duces tecum* issued by the Veterans' Administration and served upon the college required the production of records beyond the period for which such records may be required to be produced, thereby exceeding the authority of the Veterans' Administration, and that therefore the subpoena was void (R. 71).

¹ The subpoena was issued by the Manager of the Regional Office of the Veterans' Administration at Los Angeles under authority delegated to him by the Administrator of Veterans' Affairs (R. 3).

This ruling was based on the theory that the statutory grant of authority to issue a subpoena *duces tecum* was limited in scope of coverage by Veterans' Administration Regulation 10672 (38 C. F. R. 21.672) (see Appendix, *infra*, p. 26) and a derivative standard contract provision contained in the contract between the Veterans' Administration and the college (see Appendix, *infra*, p. 26) (R. 69-70). Both the regulation and the contract provision relate to the period of time during which an educational institution is compelled to retain records relating to transactions under Veterans' Administration contracts for inspection by representatives of the Veterans' Administration. No express language interrelates either the regulation or the contract provision to the statutory authority granted for the issuance of subpoenas.² In addition, the Court observed that the college was entitled not to be harassed for long periods by auditors examining their private records (R. 78) and suggested

² Both the pertinent regulation and the contract provision relating to compulsory record retention for a period of three fiscal years contain clauses stating that upon proper notice to the educational institution retention of records for longer periods of time may be compelled. Much of the opinion of the Court below was concerned with the questions of whether proper notice was given for extended retention and whether such retention applied only to records presently within the three-year period or also to records beyond the three-year retention period but still in the possession of the college (R. 68-70). The Court held that no proper notice to retain beyond the three-year period was given and that if proper notice to retain had been given, retention could only be prospective and not retroactive. In view of the theory advanced by the Government in this appeal the Court's holdings on the above two points are immaterial.

that the Government did not lack another remedy in that it could sue the college for damages based upon a projection of the auditors' determination of overpayments, and then by utilizing discovery proceedings under the Federal Rules of Civil Procedure reach the same results attempted by the subpoena (R. 75, 78, 80).

QUESTION PRESENTED

Whether Veterans' Administration Regulation 10672 concerning compulsory record retention limits the independent statutory power of the Veterans' Administration to issue and obtain judicial enforcement of a subpoena *duces tecum* under 38 U. S. C. 131, 133 for records actually in the possession of the educational institution at the time the subpoena is issued.

STATUTES INVOLVED

The relevant statutes, regulation and contract provision involved are set forth in the Appendix, *infra*, pp. 25-26.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in interpreting the statutory authority of the Veterans' Administration to issue and procure the enforcement of a subpoena *duces tecum* by circumscribing that authority with alleged implied restrictions contained in Veterans' Administration Regulation 10672 relating to compulsory record retention.

2. The District Court erred in basing in part its denial of enforcement of the subpoena on the irrelevant grounds that the Government could utilize

another remedy, and that the college would be subject to harassment were the subpoena remedy to be utilized.

3. The District Court erred in denying the Veterans' Administration petition for an Order to Require Production of Documents.

SUMMARY OF ARGUMENT

Title 38, United States Code, Sections 131, 133 authorize the Administrator of Veterans Affairs and his properly designated employees to issue subpoenas compelling the production of books, papers, documents and other evidence for the purpose of the laws administered by the Veterans' Administration and in case of disobedience to any such subpoena to obtain the aid of any district court of the United States in its enforcement. This authority to issue and enforce subpoenas extends to the duties of the Veterans' Administration under Public Laws 16 and 346. Such a nonjudicial subpoena procedure has now become an established method utilized by Congress in furthering the effectiveness of the investigatory functions incidental to practical operation of administrative agencies and has received repeated judicial approval.³

The judgment of the court below was based on the erroneous assumption that Veterans Administration Regulation 10672 and the analogous standard contract provision which related to compulsory retention of records limited the statutory authority conferred on

³ *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186; *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501; *Fleming v. Mohawk Co.*, 331 U. S. 111; *Shapiro v. United States*, 335 U. S. 1.

the Veterans' Administration to issue subpoenas *duces tecum* and to have them enforced judicially. The above regulation and derivative contract proviso are independent of the statutory subpoena authority and merely require retention of records for a period of three fiscal years, or longer if properly notified. The administrative subpoena like any other subpoena *duces tecum* reaches all relevant, properly described records in the possession of the party served and not merely records which that party may be compelled to keep. Neither logic nor interpretive analysis call for a different result.

The fact that educational institutions may be harassed if this subpoena procedure is utilized is not in point for there can be no harassment when the subpoena is issued and enforced according to law (*Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 217). Nor is it relevant that another procedure is available to the Government should this administrative subpoena be denied since bringing a suit for overpayments and then utilizing discovery procedure to ascertain to what extent overpayments have been made is not as practicable as investigation preliminary to any suit to decide whether court action should be taken at all. The above is especially pertinent in light of the national audit of educational institutions receiving funds under Public Laws 16 and 346 now being undertaken by the Veterans' Administration.

ARGUMENT

The audit of the records of the Maren Elwood College which gave rise to these subpoena proceedings is

part of a national audit by the Veterans' Administration of educational institutions receiving funds under Public Laws 16 and 346. Veterans' Administration regulations impose certain restrictions on the payment of monies to educational and training institutions under Public Laws 16 and 346.* Contracts entered into by the Veterans' Administration set further qualifications for the educational institution to meet before it may receive public funds for the training of Veterans. The present audit by the Veterans' Administration was undertaken to discover if any payments of public funds had been made contrary to law, regulation, or contract. Improper billings by a college could result in two distinct types of overpayment by the Veterans' Administration: unauthorized payment of tuition to the educational institution, and unauthorized payment of subsistence allowance to the veteran trainee.¹ Examination of the relevant records

* Public Laws 16 and 346 enacted into law Veterans' Administration Regulation 1 (a), as amended, Parts VII and VIII, 38 U. S. C. ch. 35. Parts VII and VIII marked out the basic qualifications for both veterans and educational or training institutions who wished to participate in the program envisaged by the broad mandate of Public Laws 16 and 346. Parts VII and VIII also provide that the Administrator shall have the authority to prescribe and promulgate such further rules and regulations as may be necessary to carry out the purposes and provisions of the basic laws.

¹ The following are the type of billings that give rise to either of both types of overpayments: billings for tuition prior to first day of attendance; billings for tuition subsequent to last day of attendance; billings for tuition during periods of excessive absence; billings for tuition during periods of "holidays" not authorized by contract; billings for tuition in excess of contract limitations; billings for tuition where computation by the school

of the college to verify the basis for the billings necessary to ascertain that Government funds have been properly expended. It was in this setting that the statutory subpoena power of the Administrator of Veterans Affairs was invoked.

I

The Administrator of Veterans Affairs or those employees designated by him have statutory authority to issue subpoenas *duces tecum* and to seek judicial enforcement of such subpoenas if they are disobeyed, and that authority applies to the duties of the Veterans' Administration under public laws 16 and 316.

38 U. S. C. 131 provides in pertinent part that:

For the purpose of the laws administered by the Veterans' Administration, the Administrator of Veterans Affairs, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses * * * to require the production of books, papers, documents, and other evidence * * * and to make investigations and examine witnesses upon any matter within the jurisdiction of the administration.

In the event of noncompliance, 38 U. S. C. 133, provides for enforcement of subpoenas issued pursuant

was incorrect: billings for tuition on unauthorized subjects; billings for tuition that resulted in duplicate payments; billings for tuition during periods of nonattendance in school classes; billings for tuition that represented excess workshop hours; billings for tuition that represented concurrent classes (dual attendance). The record in this case indicates that the 10% audit of the appellee's books showed the above types of improper billings (R. 22-24).

to Section 131 by the district courts of the United States. Congressional authorization for issuance and enforcement of such administrative investigatory subpoenas prior to the institution of suit is not peculiar to the duties carried on by the Veterans' Administration but has been extended to many agencies to assist them in carrying out their duties and functions.⁶ This statutory aid has received repeated Supreme Court approval. See *e. g.*, *Oklahoma Press Publishing Company v. Walling*, 327 U. S. 186 (§ 9 of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. 209); *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (§ 5 of the Walsh-Healey Public Contracts Act, 41 Stat. 2036, 41 U. S. C. 39); *Shapiro v. United States*, 335 U. S. 1 (§ 202 (c), (e) of the Emergency Price Control Act, as amended, 56 Stat. 30, 50 U. S. C. App. 922).⁷ The principal judicial restraint on this administrative subpoena power is that the disclosure sought to be compelled shall not be unreasonable. "Unreasonableness"

⁶ See *e. g.*, Emergency Price Control Act of 1942, 56 Stat. 30, 50 U. S. C. App. 922; Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. 209; Civil Aeronautics Act of 1938, 52 Stat. 1021, 49 U. S. C. 644 (c); Federal Power Act, 49 Stat. 856, 16 U. S. C. 825 (f), (c); Public Utility Holding Company Act of 1935, 49 Stat. 831, 15 U. S. C. 79 (r), (d); National Labor Relations Act, 49 Stat. 455, 29 U. S. C. 161 (2); Securities and Exchange Commission Act of 1934, 48 Stat. 900, 15 U. S. C. 78u (c); Securities Act of 1933, 48 Stat. 87, 15 U. S. C. 77t (c); Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. 49, 50; Interstate Commerce Com. Act, 25 Stat. 859, 49 U. S. C. 12 (c).

⁷ The constitutionality of this enforcement procedure was recognized as early as *Interstate Commerce Commission v. Brimson*, 154 U. S. 447. See also *Interstate Commerce Commission v. Baird*, 194 U. S. 25.

has been defined by the Supreme Court to cover indefiniteness in things required to be described with particularity in the subpoena, lack of authority in the agency to make the proposed inquiry, and irrelevance of materials sought to any investigation the agency is authorized to make.⁸

The authority of the Administrator of Veterans' Affairs under 38 U. S. C. 131 "to require the production of books, papers, documents, and other evidence" applies to "any matter within the jurisdiction of the Administration." In its use of the term "jurisdiction" the above statute necessarily encompasses, at a minimum, the functions or responsibilities specifically assigned to the Administrator of Veterans' Af-

⁸ A subpoena *duces tecum* may be issued and judicially enforced without a showing of "probable cause on the part of the administrative agency that the law has been violated." *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186. See also *Fleming v. Montgomery Ward and Co.*, 114 F. 2d 384, 390 (C. A. 7), cert. denied, 311 U. S. 690; *Bowles v. Glick Bros. Lumber Co.*, 146 F. 2d 566 (C. A. 9), cert. denied, 325 U. S. 877; *N. L. R. B. v. Barrett Co.* (C. A. 7), 120 F. 2d 583; *Walling v. Standard Dredging Corp.* (C. A. 2), 132 F. 2d 322, affirming 44 F. Supp. 601; *N. L. R. B. v. Northern Trust Co.* (C. A. 7), 148 F. 2d 24, 28. To the effect that an administrative agency is entitled to enforcement of its subpoenas without showing that the person to whom the process runs is covered by the act being enforced even when coverage is uncertain, see *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501; *Martin Typewriter Co. v. Walling* (C. A. 1), 135 F. 2d 918; *Walling v. Standard Dredging Corp.* (C. A. 2), 132 F. 2d 322; *Mississippi Road Supply Co. v. Walling* (C. A. 5), 136 F. 2d 391; *N. L. R. B. v. Northern Trust Co.* (C. A. 7), 148 F. 2d 24; *Walling v. News Printing Co.* (C. A. 3), 148 F. 2d 57. Cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 214-216. The grand jury analogy is especially pertinent in this regard. See *e. g.*, *Blair v. United States*, 250 U. S. 273, 282.

fairs. This would, of course, include transactions under Public Laws 16 and 346 whereby schools training veterans are paid by the Veterans' Administration for tuition, cost of books, supplies, and equipment.

The above statutes require the Administrator of Veterans' Affairs to administer a program of education for qualified able-bodied veterans and a program of vocational rehabilitation and training for disabled veterans. The Administrator of Veterans' Affairs has numerous duties with respect to the expenditure of Government funds under those Acts. Regulations, contract provisions and the Acts themselves provide conditions to be fulfilled and qualifications to be met before an educational institution or a veteran may receive funds under the rehabilitation program.⁹ The Administrator's duties regarding such funds include not only ascertaining that all amounts disbursed are properly payable, but also the responsibility for ascertaining any amounts which have been overpaid in the past and the taking of all administrative steps to

⁹ These conditions and qualifications are the principal reason why an audit (by subpoena if necessary) of a college's records is in order. See *e. g.*, 38 U. S. C. ch. 12, Part VIII, 2 (satisfactory grades by the veteran); 38 C. F. R. 21.260-265, 21.340-347 (allowable leave of absence by the veteran); 38 C. F. R. 21.302 (veteran's work load to qualify for "full time benefits"); 38 C. F. R. 21.446 (tuition adjustments); 38 C. F. R. 21.442 (basis of payments for residence courses—customary charges or "fair and reasonable" costs); 38 C. F. R. 21.637-38 (termination of contract with the educational institution for, *inter alia*, fraud, or the contractor's failure to furnish courses as required by the terms of the contract).

recoup such overpayments.¹⁰ The statutory power given the Administrator of Veterans Affairs to require the production of books, papers, documents and other evidence is a logical concomitant for the most practicable carrying out of the above mentioned duties. To implement the authority to issue subpoenas granted under 38 U. S. C. 131, Congress provided for judicial enforcement of such subpoenas in 49 Stat. 2033, 38 U. S. C. 133. (See Appendix, *infra*, p. 25.) That statute provides that "the aid of any district court of the United States * * * may be invoked in requiring the attendance and testimony of witnesses *and the production of documentary evidence* * * *." ¹¹ [Italics added.]

It is manifest therefore both that congressional authorization existed for the issuance of a subpoena *duces tecum* to determine the extent of any possible overpayments by the Government to the appellee under Public Laws 16 and 346 and that judicial en-

¹⁰ An improper billing by an educational institution may result not only in an overpayment to it but an overpayment of subsistence to the veteran also. If, in a proper administrative proceeding, such an overpayment of subsistence is proved to be the result of a willful or negligent failure of the school to report to the Veterans' Administration unauthorized or excessive absences from a course, or discontinuance or interruption of a course by the veteran, the amount of such subsistence overpayment to the veteran may be recovered from the school by set-off or "other appropriate action." 38 U. S. C. ch. 12, Part VIII, 5 (b). To enforce the above statutory mandate, of course, recourse must be had to the college's records.

¹¹ The underscored words negate appellee's contention in the court below that the District Court's authority is restricted to requiring the production of witnesses rather than the production of documents.

forcement of said subpoena was available to the duly authorized representatives of the Veterans' Administration upon its disobedience by the appellee.

II

The statutory authority conferred on the Administrator of Veterans' Affairs, or those employees to whom the Administrator may delegate such authority, to issue subpoenas *duces tecum*, is independent of any regulation promulgated by the Veterans' Administration or any provision incorporated in Veterans' Administration contracts with regard to compulsory retention of records for specified periods of time.

The District Court denied enforcement of the Veterans' Administration subpoena *duces tecum* mainly on the assertion that, "the provisions [of 38 U. S. C. 131, 133] relating to the production of books, papers, records and other documentary evidence or material of investigation or audit are limited by the terms of Veterans' Administration Regulation 10672 (38 C. F. R. 21.672) with respect to the books, papers, records and documentary evidence and material described in said Regulation" (R. 70-71). This premise is erroneous. The authority granted the Administrator of Veterans' Affairs, and those employees to whom he may delegate such authority,¹² by Sections 131 and 133 of the United States Code is completely independ-

¹² The Supreme Court has held that the subpoena power shall be delegable only when authority to delegate is expressly granted and has refused to imply the authority in an administrative officer to delegate the subpoena power to a subordinate. *Cudahy Parking Co. v. Holland*, 315 U. S. 357. Cf. *Bowles v. Wheeler*, 152 F. 2d 34, 39 (C. A. 9), certiorari denied, 326 U. S. 775; *Fleming v. Mahawk Wrecking and Lumber Co.*, 331 U. S. 111; *N. L. R. B. v. John S. Barnes Corp.*, 178 F. 2d 156 (C. A. 7). See also § 7 (b) of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 *et seq.*

ent of the administrative regulation and the contract provision utilized by the Veterans' Administration to compel an educational institution to retain its records for three fiscal years or for a longer period of time if proper notice is given. The subpoena *duces tecum* authorized by 38 U. S. C. 131 and enforceable under 38 U. S. C. 133 compels production of all records described in the subpoena and not merely those records the appellee was forced to retain by regulation or contract. The only limits on the plenary subpoena power under these code provisions are those imposed by the United States Supreme Court in decisions which set the boundaries for the scope of these administrative subpoenas. See *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 208-9. If the inquiry is one the demanding agency is authorized to make and there is not too much indefiniteness or breadth in the things required to be particularly described in the subpoena, and the materials specified in the subpoena are relevant to the valid purpose for which they are sought, the subpoena compels the production of that which is specified therein.¹³

¹³ The particularity of the subpoena's specification of that which it seeks and the relevance of the documents sought to some lawful purpose, stem from constitutional restrictions under the Fourth Amendment. See *Boyd v. United States*, 116 U. S. 616, and *Hale v. Henkel*, 201 U. S. 43. Compare *Oklahoma Press Publishing Co. v. Walling*, *supra* at 195 and *United States v. Morton Salt Co.*, 238 U. S. 632, 651-2. Fifth Amendment protections against self-incrimination are not available to a corporation. *United States v. Bausch and Lomb Optical Co.*, 321 U. S. 707; *Wilson v. United States*, 221 U. S. 361; *Essgee Co. v. United States*, 262 U. S. 151. Nor may corporation officers claim that to produce records will incriminate themselves. *Wilson v. United States*, *supra*. See also *Wheeler v. United States*, 226 U. S. 478.

The above factors are the limits on the scope of this administrative subpoena *duces tecum*. The fact that the regulation and contract provision compel retention of records for only specified time periods does not mean that other relevant records in the possession of an educational institution cannot be reached by such subpoenas, it only means that records falling in a certain category *must* be retained by institutions transacting business with the Veterans' Administration under Public Laws 16 and 346. Like the ordinary subpoena *duces tecum* the subpoena authorized by 38 U. S. C. 131 is not limited to records that the party served was compelled to retain but reaches all relevant records sufficiently described in the subpoena and within the possession of the party served at the time of service.

Disposition of records before being served with a subpoena *duces tecum* may, of course, defeat the subpoena unless compulsory retention of those records is required by some outside source. Therefore, if anything, Regulation 10672 (and the analogous contract provision) strengthen, not weaken, the subpoena power of Section 131 by prohibiting disposition of records before the expiration of three fiscal years, or longer if so notified. They make such records, as a matter of course, available for a statutory subpoena served during that period. In fact, as logical analysis would demonstrate, since the regulation and contract provision require retention of records for certain

periods of time for the specific purpose of inspection by representatives of the Veterans' Administration, the principal use of the statutory subpoena power would be as a device to reach records outside the specified time period.

The facts of the present case bring the above analysis into sharp focus. The regulation in question was not promulgated until September 6, 1951 (R. 64), and the derivative contract provisions were not effective prior to February 2, 1952 (R. 66). If the above regulation were only prospective in its application, as held by the District Court, there would be no effective investigatory coverage of the period prior to September 6, 1951. This latter period then can be covered only by the statutory subpoena power which reaches all relevant, adequately described records in the hands of the party served. This is the period which the subpoena in the present case purports to cover. To hold that the Veterans' Administration abdicated its subpoena power over records covering the period from October 16, 1945, through September 6, 1951, by adopting Regulation 10672, is to hold that the Veterans' Administration refuses to fulfill to the limit its duty to ascertain whether public funds disbursed by it are being properly expended. Such an interpretation of the effect of the regulation can only be characterized as unreasonable.

No implication exists either in the language used or in logic that by a regulation intended to strengthen

one area of its investigative functions the Veterans' Administration at the same time intended to surrender coverage ordinarily embraced in a subpoena *duces tecum*, over records in the possession of such as the appellee even though those records were retained voluntarily with no outside compulsion. The Veterans' Administration insists that it did not intend to limit itself as to the scope of its investigatory subpoenas (R. 75-77) and in the absence of clear language to the contrary no reason is seen for construing provisions intended to aid investigative duties as implied self-imposed limits on statutory grants of power.

If it was the intent of the Veterans' Administration in promulgating its regulation or inserting the standard contract proviso to limit its subpoena power to the period specified for compulsory retention of records it chose inartistic language to accomplish its purpose. Such an intended result could better have been reached by expressly limiting its power to subpoena records, or more logically by merely abstaining from exercising its discretionary subpoena power. Instead it chose to use words compelling retention of records for certain periods of time where previously they could have been disposed of prior to the issuance of any subpoena. Realistically viewed, records outside this compulsory retention period kept the same status they had before the regulation or contract proviso; if they were available they could be subpoenaed, if unavailable, they were lost to the Veterans' Administration.

III

The grounds given by the court below for refusal to enforce the Veterans' Administration subpoena were irrelevant since the limitations on the subpoena power of (1) authority to conduct the investigation, (2) relevancy of the materials sought and (3) specificity of demand, had not been exceeded by the Veterans' Administration.

The court below based its refusal to enforce the administrative subpoena *duces tecum* on three grounds. First, and primarily, because the statutory subpoena power had been restricted by a later Veterans' Administration regulation concerning compulsory record retention (R. 71). Second, because of the harassment such a subpoena could cause appellee (R. 78). Third, because the Veterans' Administration had an alternative remedy in that it could sue the college for damages based upon projection of the auditor's preliminary determination of overpayments, and then by utilizing discovery proceedings under the Federal Rules of Civil Procedure the same results could be reached as were sought under the subpoena (R. 75, 77, 80).

The reasons given by the Court for its refusal to enforce the subpoena are not substantiated by the law or facts of this case. As was pointed out under II *supra* the statutory subpoena power given the Administrator of Veterans Affairs is not restricted by regulations or contract provisions relating to compulsory record retention. As to any possible harassment that this subpoena might cause the appellee by auditors examining its records for long periods of time, sufficient rebuttal is offered by the observation of the Supreme Court in the *Oklahoma Press Publishing Co.*

case that there is no harassment when the subpoena is issued and enforced according to law.¹⁴ Finally, the Court's assertion that the Veterans' Administration had another remedy in a damage suit coupled with discovery proceedings under the Federal Rules of Civil Procedure and that therefore this subpoena is unnecessary, subverts the intention behind the legislative grant of this subpoena power. These investigations are preliminary to any possible suit and are often determinative of whether a suit shall be brought; they avoid the expense, inconvenience and delay attendant litigation. This has special significance in light of the fact that the Veterans' Administration is now conducting a national audit of schools receiving monies under Public Laws 16 and 346 and naturally desires to avoid litigation whenever an uncooperative school refuses to turn over its records for inspection, especially when grounds for a suit may not be known (or even nonexistent) until after an audit has been made.¹⁵

¹⁴ 327 U. S. 186, 217. See also *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, 52. The established presumption of course is that administrative officials will act properly. *United States v. Chemical Foundation, Inc.*, 272 U. S. 1; *Lewis v. United States*, 279 U. S. 63, 73; *Nofire v. United States*, 164 U. S. 657, 660; *United States v. Royer*, 268 U. S. 394, 398; *Phila. and Trenton R. R. Co. v. Stimpson*, 14 Pet. 448, 458; *Knox County v. Ninth National Bank*, 147 U. S. 91, 97; *Gonzales v. Ross*, 120 U. S. 605; *Callahan v. Myers*, 128 U. S. 617; *Keyser v. Hitz*, 133 U. S. 138.

¹⁵ The grand jury analogy has been relied on by the courts in this area; the theory being that the purpose of the subpoena is to get information bearing on the question of whether or not a complaint should be issued. See *N. L. R. B. v. Barrett*, 120 F. 2d 583 (7 Cir., 1941); *Consolidated Mines v. S. E. C.*, 95 F. 2d 704 (9 Cir., 1938).

The Supreme Court's decision in the *Oklahoma Press Publishing Co.* case, *supra*, made it clear that the administrative subpoena power is subject to only three limitations when it is sought to be judicially enforced.¹⁶ As indicated previously, those limitations are that there must be authority to conduct the investigation, the materials sought by the subpoena must be relevant, and the subpoena must describe that which it seeks with reasonable particularity.¹⁷ The authority to utilize this subpoena for investigations or audits carried on by the Veterans' Administration under Public Laws 16 and 346 has already been demonstrated under I *supra*. Both the relevance

¹⁶ The effect of the Administrative Procedure Act of 1946, 60 Stat. 237, 5 U. S. C. 1001 *et seq.*, on prior law in this area is at best uncertain. The only sections of that Act directly in point seem to be Sections 6 (b) and (c). The words of those sections imply that existing law is to continue. In addition, the Attorney General, whose agreement to the bill was important to its passage, said that these provisions merely state existing law, and a Senate Judiciary Committee Print of June 1945 is also to that effect. With regard to this legislative history see Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946), 27, 205, 227, 264, 410. The Supreme Court's decision and rationale in *United States v. Morton Salt Co.*, 338 U. S. 632, 641-2, indicates that no relevant changes have been effected.

¹⁷ As the Supreme Court pointed out in the *Oklahoma Press Publishing Co.* case at p. 217, note 57, limiting the enforcing court's power to refuse enforcement of the subpoena to the aforementioned three factors is a full satisfaction of the discretionary power implied in the use of the word "may" rather than "shall" in 38 U. S. C. 131. There are of course other more mechanical defenses available upon an order to show cause, *e. g.*, the subpoena was technically defective or it was not issued by a proper person. *Cudahy Packing Co. v. Holland*, 315 U. S. 357; *Lowell Sun Co. v. Fleming*, 120 F. 2d 213, affirmed *per curiam sub nom. Holland v. Lowell Sun Co.*, 315 U. S. 784. The present case raises no such issues.

of the materials sought to this audit for possible overpayments, and the particularity of their description in the body of the subpoena will be readily apparent to this Court on examination of the subpoena itself (R. 9-10, 64). This subpoena certainly qualifies as to particularity within the broad standard laid down by the Supreme Court in the *Oklahoma Press Publishing Co.* case, *supra*. The Court there stated that the requirement of particularity "comes down to specification of the documents to be produced adequate, but not excessive, for the purpose of the relevant inquiry. Necessarily as has been said, this cannot be reduced to a formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry" (p. 209).¹⁸

It is pertinent to add at this point that the appellee cannot moot the question of the validity of the subpoena in controversy by destroying the records that this subpoena seeks to reach. The record indicates

¹⁸ Compare *United States v. Morton Salt Co.*, 338 U. S. 632, 652, and *Detweiler Bros. v. Walling*, 157 F. 2d 841, 843, certiorari denied, 330 U. S. 819. The breadth of inquiry and the tenuous degree of relevance required by modern judicial opinion in this area is indicated by examination of a number of court of appeals decisions sustaining or compelling enforcement of these investigatory subpoenas. *Smith v. Porter*, 158 F. 2d 372 (C. A. 9), certiorari denied, 330 U. S. 810; *United States v. Cream Products Distributing Co.*, 156 F. 2d 732 (C. A. 7); *S. E. C. v. Vacuum Can Co.*, 157 F. 2d 530 (C. A. 7), certiorari denied, 330 U. S. 820; *Provenzano v. Porter*, 159 F. 2d 47 (C. A. 9), certiorari denied, 331 U. S. 816. The subpoena in the present case would qualify as to particularity and relevance even under more restrictive standards.

that the documents sought were in existence at a point in time subsequent to the date of issuance of the subpoena (R. 15, 16, 75), and that the college locked them up pending a decision on the matter by the District Court (R. 16). At the same time that the Veterans' Administration sought judicial enforcement of the subpoena, April 30, 1953, it also sought an injunction by the District Court against the college destroying, tampering or removing any of the documents sought pending a decision on the matter by the District Court (R. 8). From that point on therefore, the college handled those records at its own peril. *Jones v. Securities and Exchange Commission*, 298 U. S. 1.¹⁹

It is apparent therefore that the grounds relied on by the District Court for refusing to enforce the Veterans' Administration subpoena *duces tecum* had no basis in law and that if the proper legal grounds for refusal had been utilized the subpoena would have qualified under the facts of this case.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the Veterans' Administration petition for

¹⁹ "After a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided." 298 U. S. 1, 17-18.

an Order to Require Production of Documents should be granted.

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APPENDIX

A. Sections 131 and 133 of Title 38 U. S. C. provide in pertinent part:

Section 131.

For the purpose of the laws administered by the Veterans' Administration, the Administrator of Veterans' Affairs, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Administration.

Section 133.

In case of disobedience to any such subpoena, the aid of any district court of the United States or the Supreme Court of the District of Columbia may be invoked in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which the inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any officer, agent, or employee of any corporation or to any other person, issue an order requiring such corporation or other person to appear or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as contempt thereof.

B. Veterans' Administration Regulation 10672 (38 C. F. R. 21.672) provides in pertinent part:

* * * The educational institution shall preserve in good condition all progress and attendance records and books of account pertaining to payments and contracts for veteran training for at least a period of three fiscal years following the actual date of submission of covering vouchers to the Veterans' Administration. The maintenance of such records and books of account after the expiration of three fiscal years from the date of submission of the covering vouchers will not be required by the Veterans' Administration, unless, in specific cases their longer retention is requested by representatives of the General Accounting Office or the Veterans' Administration, in which event such records and books of account will be maintained until specific authorization exempts the institution from further retention.

C. Veterans' Administration Form 7-1986, Paragraph 6b in pertinent part is as follows:

* * * The contractor further agrees to preserve in good condition and have available at all times for inspection by representatives of the Veterans' Administration all original and related records of student attendance and absence and financial records which support claims for payment for veteran training, including financial records required to substantiate tuition rates based upon cost data, for a period (3) three fiscal years following the actual date of submission of covering vouchers to the Veterans' Administration * * *. In the event the contractor is so notified by the Veterans' Administration, the above specified records will be maintained for such further length of time in addition to three (3) fiscal years until specific authorization exempts the institution from this further retention.

No. 14057.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. C. CHAPMAN, Manager of the Regional Office of the
Veterans Administration,

Appellant,

vs.

MAREN ELWOOD COLLEGE,

Appellee.

APPELLEE'S BRIEF.

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No. 14057.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. C. CHAPMAN, Manager of the Regional Office of the
Veterans Administration,

Appellant,

vs.

MAREN ELWOOD COLLEGE,

Appellee.

APPELLEE'S BRIEF.

I.

Statement of Jurisdiction.

Pursuant to 38 U. S. C. 131 and 133, the District Court had jurisdiction to hear and deny appellant's Petition For Order To Require Production Of Documents and to discharge the Order to Show Cause issued pursuant to said Petition.

Under 28 U. S. C. 1291, this Court has authority to review the judgment of the District Court.

II.

Statement of Facts.

There is little dispute regarding the factual background giving rise to the instant controversy.

Maren Elwood College was established in 1923 for the giving of instruction and training in writing, and has been in continuous operation ever since. Appellee was incorporated in 1948 as a non-profit organization and has been recognized by the appropriate authorities of the State of California as an institution of collegiate grade qualified to issue a degree. [R. 63.] There is no dispute regarding the high educational standards and highly qualified personnel comprising the faculty of Maren Elwood College. [R. 26.]

Maren Elwood College has had a continual contractual relationship with the Veterans Administration, appellant herein, from October 16, 1945, to date, pursuant to which eligible veterans of World War II have been studying and taking courses of instruction at appellee college under the terms of the so-called "G. I. Bill of Rights" (Public Law 16, 78th Cong., 57 Stat. 43, and Public Law 346, 78th Cong., 58 Stat. 287, 38 U. S. C. 701(b)). [R. 63.] During the period from October 16, 1945, to March 31, 1953—the date on which the subpoena *duces tecum* giving rise to this controversy was served—Maren Elwood College, and all phases of its operation, have been under the constant scrutiny not only of the State of California, Department of Education, and the General Accounting Office, a Federal agency, but the Veterans Administration itself.

During the period in question appellee college has continually been subject to inspection and audit by the De-

partment of Education of the State of California which controls the curriculum of the college as well as other aspects of the schooling given, and must approve all subjects offered and classroom schedules prepared, as well as the quality and nature of the studies. [R. 29.] During the period April, 1951, through August, 1951, representatives of the General Accounting Office, a Federal agency, conducted an audit of the books and records of appellee covering a three year period from February 1, 1948, through February 1, 1951. [R. 29.] Beginning with the commencement of contractual relations with the Veterans Administration in October, 1945, and periodically thereafter, numerous training officers of the Veterans Administration whose duty it was to maintain close supervision over veterans attending the college with respect to their class schedules, attendance and grades, made frequent visits to the college. These Veterans Administration training officers attended classes at the college with the enrolled veterans in order to evaluate the progress being made by these veterans. [R. 30-31.] In addition, for several years, once a month, it was necessary for appellee college to submit to the Veterans Administration five forms setting forth in detail all aspects of the teaching and training program affecting enrolled veterans at the college. [R. 30-31.] There was no indication to appellee, or suggestion, that any of these investigations, spot checks and audits reflected adversely upon appellee college.

On April 14, 1952, the Veterans Administration sent into the college a crew of auditors which commenced a "10% audit" of the books and records of appellee college stretching back to October 16, 1945. Appellant declares that it orally notified the college at that time to maintain

all of its books and records indefinitely [R. 12]; appellee denies that such a notification was given. [R. 36-37.] The Court below found that no request was made by the Veterans Administration at that time that appellee maintain and preserve all of its records. [R. 68.]

There is no dispute that the 10% sampling of the books and records of the college was conducted by the team of auditors sent there by the Veterans Administration at least until November, 1952—a period of seven months—and it would appear from the affidavit of one of the officers, that this 10% audit was still in progress, or work in connection with it was still being done, as late as February 15, 1953—a period of ten months after it was commenced. [R. 13.]

Nor is it disputed in the Record that the Veterans Administration sought to have appellee college agree to a projection of the alleged result of this 10% audit by multiplying such alleged result by 10. [R. 34.] Appellee refused to agree to the proposed projection method of audit and has signed no agreement to that effect, despite strong pressure exerted upon it seeking to compel agreement. [R. 35, 39-40.]

On March 27, 1953, after admittedly no work had been done upon the audit since February 18, 1953 [R. 13], the Veterans Administration, through one of its auditors, appeared at the college seeking space for facilities for his crew of four auditors, to make a 100% audit of all of the books and records of appellee for the entire period from October 16, 1945, to that date. Although appellee

was then advised that if it would agree to the 10% projection demand, the Veterans Administration would be satisfied with only a 25% or at most a 50% audit, appellee refused to yield and refused to agree to the projection method urged by appellant. [R. 35.]

On March 31, 1953, employees of the Veterans Administration demanded that appellee make available for examination and audit all of its records from October 16, 1945, to that day. [R. 35, 15.] Appellee informed these representatives of the Veterans Administration that it would produce for audit purposes only those books and records from February 1, 1950, to that date, a period of approximately three years. [R. 35.] Thereupon, to compel production of all of these records, the Veterans Administration issued and caused to be served upon appellee a subpoena *duces tecum* commanding the production forthwith of appellee's records from October 16, 1945, described and designated as follows:

- (1) All Instructor Class Record Books, including Workshop and Study Halls, for the period 10/16/45 through 1/31/53.
- (2) All monthly recap of attendance records—central office records—for the period 10/16/45 through 1/31/53.
- (3) All emergency leave slips for veteran students for the period 12/1/49 through 1/31/53.
- (4) All transcript of veteran student grades for the period 10/16/45 through 1/31/53.

- (5) All individual veteran students folders, containing school retained copies of Veterans Administration documents consisting of award action, letters of authorization, certificates of eligibility, students' individual schedules of classes, and correspondence by and between the veteran, the school, and the Veterans Administration. [R. 64.]

Appellee refused to comply with the terms of said subpoena *duces tecum*, but did make available for inspection and audit by the Veterans Administration all of the pertinent books, documents and records of appellee for three fiscal years preceding the date of said subpoena, and at the time the instant proceeding was pending in the Court below, and even at its conclusion, the audit of said books and records was in progress. [R. 64.]

On April 30, 1953, the Veterans Administration filed its Petition For Order To Require Production Of Documents in the District Court seeking to have the afore-said subpoena *duces tecum* judicially enforced. [R. 3-17.] Based upon the Petition and certain supporting affidavits, the District Court, *ex parte*, on said date issued an Order to Show Cause directed to appellee college, requiring appellee to appear and show cause why it should not be ordered to produce the quantity of records and documents described in the subpoena *duces tecum*. [R. 17-18.] Appellee duly filed its Reply to said order to show cause together with supporting affidavits. [R. 19-44.] The cause came on for hearing on July 13, 1953, before the Honorable William C. Mathes, United States District Judge. After hearing, the Court ordered the Petition denied and the Order to Show Cause discharged. [R. 61.]

III.

Statutory Provisions, Regulations and Contract
Provisions Involved.

A. Statutes.

Section 131, Title 38, U. S. C.:

For the purpose of the laws administered by the Veterans' Administration, the Administrator of Veterans' Affairs, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Administration. Any person required by such subpoena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States.

Section 133, Title 38, U. S. C.:

In case of disobedience to any such subpoena, the aid of any district court of the United States or the Supreme Court of the District of Columbia may be invoked in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which the inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any officer, agent, or employee of any corporation or to any person, issue an order requiring such corporation or

other person to appear or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

B. Regulations.

On September 6, 1951, the Veterans Administration promulgated the following regulation dealing with the maintenance and retention of records by institutions such as appellee college (38 C. F. R. 21.672):

MAINTENANCE AND RETENTION OF RECORDS AND REPORTS

Veterans Administration Regulation 10672

Educational institutions furnishing training to veterans under part VII and part VIII, as amended, will maintain records of progress and attendance of veterans in training and will make available such records and furnish such reports to the V. A. at such intervals as may be mutually determined and as may be necessary and required by the V. A. to administer the training of veterans as required by the law. An institution of higher learning will not be expected to maintain for veteran-trainees records of attendance not normally maintained for other students. Educational institutions furnishing training to veterans under part VII and part VIII, as amended, will also maintain adequate financial records required to substantiate tuition rates based upon cost data. Financial records, where required as above, will include but not be limited to the following—payroll ledgers, canceled checks, disbursement vouchers, invoices, general ledgers, journals, ledgers for cash receipts and cash disbursements, inventory records, records of accounts payable, and accounts receivable.

The educational institution shall preserve in good condition all progress and attendance records and books of account pertaining to payments and contracts for veteran training for at least a period of three fiscal years following the actual date of submission of covering vouchers to the V. A. The maintenance of such records and books of account after the expiration of three fiscal years from the date of submission of the covering vouchers will not be required by the V. A., unless in specific cases their longer retention is requested by representatives of the General Accounting Office or the V. A., in which event such records and books of account will be maintained until specific authorization exempts the institution from their further retention.

This is the first and only regulation of the Veterans Administration dealing with the maintenance and retention of books, records and reports by institutions in the position of appellee college. [R. 64-66.]

C. Contract Provisions.

The provisions of the aforesaid regulation were incorporated only in the two last contracts between appellee college and the Veterans Administration, to wit, Contract No. V 3044 V-1099 and Contract No. V 3044 V-1225 covering only the inclusive periods of February 2, 1952, to January 29, 1954. A part of each of said contracts (Veterans Administration Form 7-1903) was Veterans Administration Form 7-1986, paragraph 6b of which reads as follows:

- b. The contractor agrees to maintain records of progress and attendance of veterans in training, and to make available such records and furnish such reports to the Veterans Administration at such inter-

vals as may be mutually determined and as may be necessary and required by the Veterans Administration to administer the training of veterans as required by law. The contractor further agrees to preserve in good condition and have available at all times for inspection by representatives of the Veterans Administration all original and related records of student attendance and absence and financial records which support claims for payment for veteran training, including financial records required to substantiate tuition rates based upon cost data, for a period of (3) three fiscal years following the actual date of submission of covering vouchers to the Veterans Administration. Such financial records will include, but not be limited to the following: Payroll ledgers, cancelled checks, disbursement vouchers, invoices, general ledgers, journals, ledgers for cash receipts and cash disbursements, inventory records and records of accounts payable and accounts receivable. In the event the contractor is so notified by the Veterans Administration, the above, specified records will be maintained for such further length of time in addition to three (3) fiscal years until specific authorization exempts the institution from this further retention. Notwithstanding the above provisions, where the Contractor makes and retains microfilms of the receipts taken for books, supplies and equipment furnished to veteran trainees which pertain to this contract, the Contractor as an alternate procedure may immediately destroy such receipts as have been microfilmed, provided such microfilm records will be kept available for the inspection of the Veterans Administration. [R. 66-68.]

IV.

Question Presented.

Did the District Court err in refusing to grant the Veterans Administration Petition for Order to Require Production of Documents?¹

- a. Is the subpoena *duces tecum* of March 31, 1953, reasonable?
- b. Is the power of the Administrator of Veterans' Affairs to compel the production of records from educational institutions such as appellee limited by the terms of Veterans Administration Regulation 10672?
- c. Did the District Court have jurisdiction under 38 U. S. C. 133 to grant the orders sought by the appellant in his Petition below?

V.

SUMMARY OF ARGUMENT.

A. The Subpoena Duces Tecum Served Upon Maren Elwood College Is Excessively Broad in Scope, Oppressive, and Hence Unreasonable, and Its Judicial Enforcement Was Thus Properly Denied.

The Supreme Court in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1948), made it plain that before an administrative subpoena *duces tecum* may be ju-

¹It is well settled that an appellate tribunal may affirm a case on grounds other than those which prompted the judgment below. *Commissioner of Internal Revenue v. Bryson*, 79 F. 2d 397, 402 (C. A. 9, 1935); *Kishan Singh v. Carr*, 88 F. 2d 672, 678 (C. A. 9, 1937). The question before the appellate court is whether or not the judgment appealed from was correct. *Davis v. Packard*, 31 U. S. 41, 47 (1832); *J. E. Riley Inv. Co. v. Commissioner of Internal Revenue*, 311 U. S. 55, 59 (1940).

dicially enforced the Court must not only determine, as appellant contends (App. Br. 10-11, 15, 21), that the inquiry is authorized by law, the materials relevant, and their description particular, but most important, must also determine that it is not too broad in scope, that it is "adequate, but not excessive" (*Oklahoma Press Publishing Co. v. Walling, supra*, at 209), before it will be found to be reasonable and entitled to judicial approval.

The instant subpoena *duces tecum* is not reasonable by this test. It is broad, sweeping, and all-inclusive in its terms, calling as it does for nearly every paper, record, and document in appellee's possession for every veteran student who ever attended the college for a period of more than seven years. The volume and quantity of these records is enormous, and the burden it seeks to impose upon appellee, staggering.

Appellee has voluntarily made available for inspection and audit all of its records covering the last three years of its operations. It is only these records which it is required to maintain under the Veterans Administration's own Regulation on the subject (Veterans Administration Regulation 10672, 38 C. F. R. 21.672) and only these records which it agreed "to preserve in good condition and have available at all times for inspection by representatives of the Veterans Administration" in its contracts with that agency. [R. 66-68.]

The oppressive and unreasonable nature of the subpoena *duces tecum* demanding the production of all these records and papers reaching back to the first day of the contractual relationship between appellee college and the Veterans Administration—October 16, 1945—is underscored by the fact that throughout this period all aspects of

appellee's operations have been constantly and closely scrutinized, checked, and audited by the California Department of Education, the General Accounting Office, and the Veterans Administration itself.

The instant subpoena *duces tecum* is the outgrowth of appellee's refusal, in the face of threat and administrative pressure,² to yield and agree to the 100% projection of the alleged results of a 10% audit conducted by the Veterans Administration. It represents a bald assertion of "plenary" (App. Br. 15) administrative subpoena power to force such agreement. The District Court properly refused to lend judicial approval to so harsh and oppressive an administrative action.

B. The Scope of the Subpoena Duces Tecum Exceeds the Limitation Contained in Veterans Administration Regulation 10672, which Regulation Has the Force and Effect of Law and, at Least by Implication, Controls the Administrator's Power to Demand the Production of Records.

Regulations promulgated by an administrative agency, duly authorized, have the force and effect of law. *Forbes v. United States*, 125 F. 2d 404, 409 (C. A. 9, 1942).) They are binding equally upon those who deal with the

²It is not disputed that since November, 1952, all payments due Maren Elwood College for veteran students' tuition—amounting to several thousand dollars—were suddenly cut off by the Veterans Administration, although at the time of the hearing below three semesters had already passed with veteran student training having been furnished throughout. [R. 39-40.] Yet the Regulations of the Veterans Administration require "a proper administrative proceeding" (App. Br. 13, n. 10), namely "a hearing before the Committee on Waivers of the appropriate Veterans' Administration regional office" before an alleged overpayment of subsistence may be recovered from the school "by an off-set from amounts otherwise due the school." 38 U. S. C., Chap. 12, Part VIII, 5(b).

agency and the agency itself. *United States v. Perkins*, 79 F. 2d 533, 534 (C. A. 2, 1935).

Veterans Administration Regulation 10672 (38 C. F. R. 21.672) requires educational institutions such as appellee college to maintain and preserve their records covering only the most recent three years of their operations, unless a specific request for longer retention is made. No such request was made here. [R. 68, 70, 80.]

The provisions of this Regulation were incorporated by the Veterans Administration in the last two contracts with appellee college covering the period February 2, 1952, to January 29, 1954, and made it plain that appellee agreed to preserve in good condition and have only these recent records "available at all times for inspection by representatives of the Veterans Administration." This appellee has done. [R. 64.]

The District Court properly concluded that the clear implication of this Regulation was that the period of audit would likewise be governed by the same terms. Only thus interpreted would the Regulation have real meaning. This interpretation is reinforced by a consideration of the effects which would flow from adopting the contrary view urged by appellant. Administration and enforcement would thereafter be unequal and uneven depending entirely upon the fortuitous circumstance of what records each educational institution chanced to have kept longer than three years. Moreover, it would place a premium upon the prompt destruction of all records more than three years old and penalize those institutions which retained their records beyond that time.

C. The District Court Lacked Jurisdiction to Issue the Order Sought by the Administrator of Veterans' Affairs.

Section 133, Title 38, U. S. C., provides that the Administrator of Veterans' Affairs, where compliance with a subpoena is refused, may apply to the appropriate district court for aid in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court "may . . . issue an order requiring such . . . person *to appear or to give evidence touching the matter in question; . . .*" Appellee duly appeared pursuant to the order of the District Court and gave evidence touching the matter in question. [R. 19-44.] Under the precise terms of the controlling statute, the Court below could require no more.

The distinction between giving evidence or testimony and producing books, records, and documents is carefully spelled out in the parallel statutory provisions governing other administrative agencies. (*E. g.*, Civil Aeronautics Act of 1938, 49 U. S. C. 644(c), (d); Interstate Commerce Commission Act, 49 U. S. C. 12(3).) Thus, when Congress intended to confer jurisdiction upon courts to order *both* testimony *and* the production of records, it clearly and expressly set forth this intention in unmistakable terms. That it has not done so with respect to subpoenas of the Veterans Administration is evident.

Moreover, nothing in the controlling statute authorizes the broad orders of impounding and injunction also sought by the Veterans Administration.

VI. ARGUMENT.

The “setting” described by appellant in which the subpoena power of the Administrator of Veterans’ Affairs was allegedly here invoked (App. Br. 7-9), is incomplete and therefore misleading, omitting as it does matters vital to a fair understanding of the instant controversy and asserting as fact matter for which there is no shred of support in the Record.

In appellant’s description of this “setting,” and at two additional places in its brief (App. Br. 7, 20), it is asserted that the “audit of the records of the Maren Elwood College . . . is part of a national audit by the Veterans’ Administration of educational institutions receiving funds under Public Laws 16 and 346.” (App. Br. 7-8.) *There is nothing in the Record to support this assertion.* There is no suggestion in any of the documents filed by appellee below—its Petition, Affidavits, and Memorandum [R. 3-16, 45-61]—or even in the argument [R. 74-80], that there was, or is, such a “national audit” in progress, or that the Maren Elwood College audit was a part of it. This departure from so fundamental a principle of appellate procedure³ undertaken in an effort to persuade this Court of the Administrator’s “reasonableness” in making the broad demand which he has, is persuasive evidence to the contrary.

While on the one hand thus reaching outside the Record to color its version of the case setting, appellant, on

³*United States v. Hosmer*, 76 U. S. 432 (1869); *Holmes v. Trout*, 32 U. S. 171 (1833); *American Trust Co. v. Harris*, 88 F. 2d 541 (C. A. 9, 1937); *Century Indemnity Co. v. Nelson*, 96 F. 2d 679 (C. A. 9, 1938).

the other, omits any reference to wholly uncontroverted matter in the Record which places the action of the Administrator in its true perspective. The attempt to picture the Administrator as trying merely to perform his statutory duties in good faith despite difficulties and misunderstanding simply will not stand up in the face of the Record here of disparagement and innuendo, of threats and coercion, directed against appellee in an effort to force agreement to a 100% projection of the alleged results of a 10% audit. [R. 34, 35, 39-40, 40-42, 44.]⁴ Nor is the setting complete without reference to the numerous checks, audits and investigations already made of all phases of appellee's operations and of the close and constant supervision of all its activities by both State and Federal agencies during the entire period of its contractual relationship with the Veterans Administration. [R. 29-31, 32-33.]

It is in this setting, bearing in mind that the broad terms of the subpoena *duces tecum* encompass a huge mass of records relating to every one of hundreds of veteran students who attended Maren Elwood Colege over a period of 7¼ years, that the instant controversy must be viewed. For the refusal of Miss Maren Elwood, founder and owner of Maren Elwood College, to accede to these broad and sweeping demands is not based upon

⁴While it is, of course, the established presumption, as appellant declares (App. Br. 20, n. 14) that administrative officials will act properly, such presumption is rebuttable by evidence to the contrary. *United States v. Chemical Foundation, Inc.*, 272 U. S. 1 (1926); *Lewis v. United States*, 279 U. S. 63, 73 (1929); *Nofire v. United States*, 164 U. S. 657, 660 (1897); *United States v. Royer*, 268 U. S. 394, 398 (1925). See, *Jackson Packing Co. v. N.L.R.B.*, 204 F. 2d 842, 844 (C. A. 5, 1953); *Mississippi Road Supply Co. v. Walburg*, 136 F. 2d 391, 394 (C. A. 5, 1943).

any arbitrary or capricious desire to disobey any lawful process or order. Appellee's refusal—approved by the District Court—to yield to the command of the Veterans Administration contained in the subpoena *duces tecum* rests upon the grounds that the terms of the subpoena are excessively broad in scope, oppressive and unreasonable, not authorized by law and in excess of the powers of the Veterans Administration. Moreover, there is serious question of the authority or jurisdiction of the District Court to issue the orders for which the Administrator petitioned.

A. The Subpoena Duces Tecum Served Upon Maren Elwood College Is Excessively Broad in Scope, Oppressive, and Hence Unreasonable, and Its Judicial Enforcement Was Thus Properly Denied.

The most recent and complete consideration by the Supreme Court of administrative subpoenas and their judicial enforcement is contained in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946). There Justice Rutledge, speaking for a majority of the Court, announced the principles controlling the validity and enforcement of subpoenas issued by administrative agencies. It is upon this case, or more accurately upon its analysis of this case, that appellant relies in seeking to establish the validity of the subpoena *duces tecum* served upon Maren Elwood College and to establish the error of the Court below in refusing to enforce it. (App. Br. 7, 10-11, 15, 20, 21.)

As appellant reads the *Oklahoma Press Publishing Co.* decision, he finds that the requirement that administrative subpoenas be reasonable is satisfied if three conditions are met, namely:

1. That the proposed inquiry is authorized;

2. That the materials sought are relevant; and
3. That the materials sought are described with particularity. (App. Br. 11, 21.)

Authority, relevancy and particularity are, in appellant's view, the three ingredients which result in a subpoena being reasonable. This is, we submit, an assertion of plenary administrative power not only contrary to our basic concepts of government, but is not warranted by, and represents an improper analysis of, the *Oklahoma Press Publishing Co.* decision.

For the Supreme Court, while concerned in that case only with the three elements of reasonableness mentioned, makes it plain that over and above these there is the additional requirement that the breadth and scope of an administrative subpoena must not be excessive, that it must not be so broad and all-encompassing in its terms as to be oppressive. That this is a fourth and vital factor in every case in which judicial sanction of an administrative subpoena is sought, is plain from the language of the opinion itself.

Thus, at the outset, Justice Rutledge points out that no objection had been taken in that case "to the breadth of the subpoenas." (*Oklahoma Press Pub. Co. v. Walling, supra*, at 195.)

But that the breadth and scope of an administrative subpoena are of importance in determining its legal validity, is more affirmatively emphasized in other passages of the Court's opinion (*Oklahoma Press Publishing Co. v. Walling, supra* 208, 209, 213, 217):

"The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

“ . . . Beyond this the requirement of reasonableness, *including* particularity in ‘describing the place to be searched, and the persons or things to be seized,’ also literally applicable to warrants, comes down to specification of the documents to be produced adequate, *but not excessive*, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or *excess in the breadth of the subpoena* are matters variable in relation to the nature, purposes and scope of the inquiry. . . .

“In these results under the later as well as the earlier decisions, the basic compromise has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. The latter are not identical with those protected against invasion by actual search and seizure, nor are the threatened abuses the same. They are rather the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. *Officious examination can be expensive, so much so that it eats up men’s substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason* . . .

“The Administrator is authorized to enter and inspect, but the Act makes his right to do so subject in all cases to judicial supervision. *Persons from whom he seeks relevant information are not required to submit to his demand, if in any respect it is unreasonable or overreaches the authority Congress has*

given. To it they may make 'appropriate defence' surrounded by every safeguard of judicial restraint. . . ." (Emphasis supplied.)⁶

These factors of breadth and scope, of excessiveness and oppressiveness, stressed by Justice Rutledge as representing the fourth dimension of the total concept of reasonableness as applied to an administrative subpoena, is wholly ignored by appellant. That the subpoena *duces tecum* here is broad and all-inclusive cannot be denied—nor does appellant attempt to do so. Practically every record and every document covering every veteran student at Maren Elwood College for a period of more than 7 years is called for by the subpoena. All class, workshop and study hall records, all monthly attendance records, all transcripts of all grades for 7½ years are demanded. [R. 64.] And the 5th subsection of the subpoena serves as a catch-all, requiring the production of the complete folders of every veteran student, including all correspondence for a period of almost 7½ years. [R. 64.]

⁶Justice Murphy, dissenting in *Oklahoma Press Publishing Co. v. Walling*, *supra*, 218-219, sounds a not untimely warning:

"Administrative law has increased greatly in the past few years and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who 'sent hither swarms of officers to harass our people.'"

Compare, Mathes, J., in the instant case. [R. 78.] See, also, *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305-306 (1924); *Hale v. Henkel*, 201 U. S. 43, 76 (1906); *Goodyear Tire and Rubber Co. v. N.L.R.B.*, 122 F. 2d 450, 453 (C. A. 6, 1941).

The Record below discloses the heavy, oppressive burden which compliance with this subpoena would impose upon appellant. [R. 36, 38.] Obviously, the books, documents and records involved are voluminous. They cover a period of approximately $7\frac{1}{4}$ to $7\frac{1}{2}$ years. They refer to every student who studied during that entire period of time at Maren Elwood College under the G. I. Bill of Rights. It is apparent that the books and records pertaining to so large a number of students over so long a period of time, are exceedingly extensive. To produce them all and to make them available in some orderly fashion to the auditors of the Veterans Administration as they require them—even assuming that all of the records are in existence and could be found—would plainly be an extremely difficult, time-consuming, and expensive task for appellee.

Some notion of the time which would be consumed in the making of the audit by the Veterans Administration—and the accompanying burden upon appellee—had the Court below granted the order sought, may be obtained from a consideration of the time which it has already taken the Veterans Administration to conduct its so-called 10% audit.

According to the affidavits filed by the Veterans Administration in support of its Petition below, the 10% audit was commenced on April 14, 1952, and it was not until November, 1952 [R. 6-7], that it “appeared” that certain alleged “improper billings” had been made. This represents a period of $7\frac{1}{2}$ months. Adopting the projection method, so strenuously sought to be imposed by the Veterans Administration upon appellant, it is apparent that a 100% audit would take 75 months, or more

than 6 years. In fact, the affidavit of John D. Pearson, who was the accountant in charge of the audit team which conducted the audit at Maren Elwood College, recites that no work was done by the audit team on the 10% audit between February 18 and March 27, 1953, thus implying that work on such audit was actually in progress until February 18, 1953, approximately 10 months after it was begun on April 14, 1952. [R. 13.] Projecting the time consumed on a 100% audit basis, it would appear that 100 months, or nearly 8½ years, would be required to complete the examination and auditing of the documents, papers, books and records sought by the Veterans Administration in its subpoena. The staggering burden which this would impose upon appellee is self-evident.

While it is recognized that the heavy expense, inconvenience, and dislocation which would necessarily be involved for appellee should this subpoena *duces tecum* receive judicial approval, taken alone, are not wholly determinative of its reasonableness, yet they do serve to underline the scope and breadth of the subpoena and the crushing burden which it seeks to impose. And taken together with the close and constant supervision of all phases of appellee's operations during this entire period of time, not only by appropriate state agencies and officers, but by training officers and other representatives of the Veterans Administration who have been in intimate contact with the veterans' training program at Maren Elwood College from its inception and have reported regularly to the Veterans Administration on all aspects of its operation [R. 29-33], its unreasonableness and harshness becomes apparent.

In addition to approximately 10 so-called "spot checks" of all of its books and records, both by representatives of the Department of Education of the State of California and representatives of the Veterans Administration and General Accounting Office, the latter agency has already completed an audit of appellee's books and records for the three-year period from February 1, 1948, through February 1, 1951. [R. 29.] Nor should it be overlooked, in this regard, that appellee has at all times voluntarily made available for inspection and audit all pertinent books, documents and records covering the 3-year period preceding the date of the subpoena, and an audit of said books and records by the Veterans Administration was in progress when this matter was heard in the Court below. [R. 64.]

The terms of Veterans Administration Regulation 10672 (38 C. F. R. 21.672), promulgated September 6, 1951, whose provisions were incorporated in the last two contracts between Maren Elwood College and the Veterans Administration [R. 66], establishing a 3-year record retention requirement, are strong evidence of what the Administrator himself believed reasonable in this area of his authority. It is not without significance that this Regulation became effective on September 6, 1951, approximately 6 years after the inception of the Veterans' Training and Rehabilitation Program. Much of the records of educational institutions were already old and useless. Too, they were volunimous and becoming more so with every passing day. Hence the authority to destroy all records more than 3 years old.

The Regulation recognized that it was reasonable to require educational institutions such as appellee to keep available for inspection, examination and audit only those

records covering the last 3 years of such institution's operation. This same standard and limitation was carried forward and incorporated into the succeeding contracts between appellee and the Veterans Administration, thus again emphasizing the apparent reasonableness of this requirement and limitation. Inclusion of this limitation in the contracts had the effect of bringing it directly to the attention of appellee, and other educational institutions similarly situated, that this was what the Administrator believed to be reasonably required for the purposes of his administration. Yet the subpoena *duces tecum* which the Administrator seeks to have this Court approve, goes far beyond the time limitations set in his own Regulation, calling as it does for records stretching back over a period of more than 7 years.

As we have already shown, it is incorrect to assume, as does appellant, that once the Court finds authority, relevancy, and particularity, it must approve the subpoena. By this test there would be nothing to stand in the way of the situation which the Court below envisioned, that in 1960 "if some school was diligent enough to keep the records, and some accountant wanted to project a 10 per cent audit and multiply it by 10, and the person did not want to do it, then the Administrator could demand an audit for 15 years of those records." [R. 77.] But the Courts, as has been frequently announced, are not required thus mechanically to approve administrative subpoenas. The governing statute, providing as it does, that the Court "may" issue an appropriate order to obtain enforcement of a subpoena (38 U. S. C. 133), has expressly provided for more than a mere mechanical scrutiny to determine compliance with certain technical requirements. The judicial function goes far beyond

this in determining the reasonableness of an administrative subpoena and in passing upon the question of whether or not it should receive judicial sanction and approval.⁶

Justice Brandeis in *Myers v. Bethlehem Corp.*, 303 U. S. 41, 49 (1938), made this clear:

“The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and *to such an application appropriate defence may be made.*” (Emphasis supplied.)

And in *Fleming v. Mohawk Co.*, 331 U. S. 111, 124 (1947), Justice Jackson in his concurring opinion announced the same principle:

“Enforcement of such subpoenas by the Courts is not and should not be automatic.”

Justice Frankfurter, dissenting in *Penfield Co. v. S. E. C.*, 330 U. S. 585, 604 (1947), gave a more detailed definition of the judicial function when passing upon applications for the enforcement of administrative subpoenas:

“Instead of authorizing agencies to enforce their subpoenas, Congress has required them to resort to the courts for enforcement. *In the discharge of that duty courts act as courts and not as administrative adjuncts.* The power of Congress to impose on courts the duty of enforcing obedience to an ad-

⁶“The Government concedes that the district courts are more than mere rubber stamps of the agencies in enforcing administrative subpoenas and lists as examples of appropriate defenses . . . that the subpoena is unduly vague or unreasonably oppressive . . .” (Emphasis supplied.) *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 512 (1943), dissenting opinion of Justice Murphy.

ministrative subpoena was sustained precisely because courts were not to be automata carrying out the wishes of the administrative. They were discharging judicial power with all the implications of the judicial function in our constitutional scheme. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; 155 U. S. 3." (Emphasis supplied.)

In *Jackson Packing Co. v. N.L.R.B.*, 204 F. 2d 842, 844 (C. A. 5, 1953), Hutcheson, C. J., related the judicial function directly to the protection of individuals from oppressively drawn administrative subpoenas:

" . . . whenever it is made to appear to the court that a subpoena is too broadly or oppressively drawn or there are reasons to believe that it will be enforced capriciously or oppressively, it is the duty of the court to prevent abuse of its process"

See, also, *N.L.R.B. v. Anchor Rome Mills*, 197 F. 2d 447, 449-450 (C. A. 5, 1952).

The serious threat which the oppressive and unreasonable administrative subpoena poses for individual liberty has frequently claimed the attention of the courts. Chief Justice Stone writing in *Cudahy Packing Co. v. Holland*, 315 U. S. 357, 363 (1942), and speaking of the subpoena power vested in administrative agencies, warned:

"It is a power capable of oppressive use especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

This Court, in *Bowles v. Abendroth*, 151 F. 2d 407, 408 (C. A. 9, 1945), also emphasized that judicial en-

forcement may be denied an administrative subpoena which is unreasonable in its scope:

“Enforcement, may, of course, be declined if the administrative subpoena is vague or *unreasonably burdensome*.” (Emphasis supplied.)

To the same effect, see: *Hale v. Henkel*, 201 U. S. 43 (1906); *Boyd v. United States*, 116 U. S. 616 (1886); *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 305-306 (1924); *United States v. Morton Salt Co.*, 338 U. S. 632, 653 (1950); 42 Am. Jur. 416 (“A subpoena *duces tecum* by reason of its scope and onerous requirements may be unreasonable or constitute an abuse of discretion . . .”).

The subpoena *duces tecum* of March 31, 1953, served upon appellee by the Administrator of Veterans' Affairs, is by every test unreasonably burdensome and oppressive. Its sweeping terms include practically every document in appellee's possession. Its broad demands reach back over a period of more than 7 years.⁷ The heavy burden of

⁷So far as can be determined from the reported opinions, none of cases cited by appellant in which administrative subpoenas were sustained involved an attempt, as here, to reach records covering a period of more than 7 years. *Smith v. Porter*, 158 F. 2d 372 (C. A. 9, 1946) (approximately 3 years); *Provenzano v. Porter*, 159 F. 2d 47 (C. A. 9, 1947) (13 months); *Hagen v. Porter*, 156 F. 2d 362 (C. A. 9, 1946) (1 year and 5 days); *Detweiler Bros. v. Walling*, 157 F. 2d 841 (C. A. 9, 1946) (4 years, 3 months); *Wheeler v. United States*, 226 U. S. 478 (1913) (15 months). See, also, *Brown v. United States*, 276 U. S. 134 (1928) (2½ years). Cf. *Bank of America Nat. Trust & Savings Assn. v. Douglas*, 105 F. 2d 100 (C. A. D. C., 1939), where a subpoena issued by the Securities and Exchange Commission sought records covering a 10-year period and judicial enforcement was denied.

time and expense which enforcement of this subpoena would impose upon appellee is not disputed.

The unreasonable nature of the subpoena and the absence of any real necessity for so all-inclusive a demand, is established by the unchallenged evidence of the careful and constant supervision and scrutiny to which appellee has from the beginning been subjected by State and Federal agencies including representatives of the Veterans Administration. The reference of the Court below to other remedies available to the Administrator [R. 75, 80], is a reflection of the feeling of the District Court of the unreasonableness of the subpoena here involved and the lack of any real necessity for it. Veterans Administration Regulation 10672, requiring prospectively the maintenance by educational institutions such as appellee of all pertinent records covering a 3-year period itself establishes a standard of reasonableness which is persuasive here. These records appellee has freely made available for examination and audit by the Veterans Administration.

All of these factors, taken together, demonstrate the oppressive and unreasonable nature of the Administrator's subpoena *duces tecum*. Its judicial enforcement was therefore properly denied by the District Court.

- B. The Scope of the Subpoena Duces Tecum Exceeds the Limitation Contained in Veterans Administration Regulation 10672, Which Regulation Has the Force and Effect of Law and, at Least by Implication, Controls the Administrator's Power to Demand the Production of Records.

Veterans Administration Regulation 10672 (38 C. F. R. 21.672) which became effective September 6, 1951, deals with the maintenance and retention of records of educational institutions such as appellee college and provides, in substance, that adequate records shall be maintained; that the educational institution is to preserve them for a period of 3 fiscal years following the date of the submission of covering vouchers to the Veterans Administration; that the maintenance of such books and records beyond this 3-year period is not required unless in specific cases their longer retention is requested by the General Accounting Office or the Veterans Administration; that upon such request, the appropriate records and books of account are to be preserved until specific authorization relieves the institution from their further retention.

The Court below determined from an examination of the language and purpose of the Regulation, that its operation was prospective only. [R. 70.] The Court further determined that no appropriate request had been made by the Veterans Administration for the longer retention by appellee college of any of its records. [R. 70.] Appellant does not dispute these conclusions, considering them irrelevant under its theory that the statutory grant of authority to the Administrator to conduct investigations is unaffected by its own regulations and subject to no limitations of scope or breadth. (App. Br. 4, n. 2.) In any event, since these determinations are not disputed,

they must be accepted as correct and will not be further discussed by appellee, although these were two of the major issues below.

Thus, for present purposes, it may be said that this Regulation provides for the retention of records for a 3-year period. It is true that there is no express declaration that subpoenas shall not call for records more than 3 years old whose retention has not been requested. But we submit that the plain implication of this Regulation promulgated by the Administrator of Veterans' Affairs is that the period of audit and the examination of records, would likewise be governed by the same terms. Otherwise, there would be little meaning to the retention of any records for any stated period of time and the authority given to destroy all others. The Regulation has real meaning only if it relates not only to the preservation of certain books and records, but to the audit and inspection of such books and records which are the stated purposes for which they are to be preserved.

It is well settled that duly authorized administrative regulations have the force and effect of law. (*Forbes v. United States*, 125 F. 2d 404, 409 (C. A. 9, 1942); *Jones v. United States*, 189 F. 2d 601, 603 (C. A. 8, 1951).) Moreover, it is equally clear that such an administrative regulation may be self-denying or limiting in character. See, *N.L.R.B. v. Red Rock Co.*, 187 F. 2d 76, 78 (C. A. 9, 1951), cert. den. 341 U. S. 950) and when promulgated is binding upon all who come within its scope, including the administrative agency itself. (*Sheridan-Wyoming Coal Co. v. Krug*, 172 F. 2d 282, 287 (C. A. D. C., 949), revd. on other grounds *sub. nom. Chapman v. Sheridan-Wyoming Coal Co.*, 338 U. S. 621 (1950);

United States v. Perkins, 79 F. 2d 533, 534 (C. A. 2, 1935); *Germania Iron Co. v. James*, 89 Fed. 811 (C. A. 8, 1898); *Sibray v. United States*, 282 Fed. 795 (C. A. 3, 1922).)

The unequal and uneven administration of the investigative and enforcement responsibilities of the Veterans Administration which would follow from the adoption of appellant's interpretation that the Regulation in nowise limits the records subject to audit and examination, is readily apparent. Thus, if an institution, adhering strictly to the terms of the Regulation, regularly destroyed all of its records which related to periods beyond its most recent 3 fiscal years, an administrative subpoena could reach only such current material. Such an institution would be impervious to the pressure and burden to which appellee is being subjected. However, if an institution chanced to keep rather than destroy such old records, it would, in appellant's view, be always subject to the demands of the Veterans Administration that they be produced forthwith for examination, inspection and audit. This makes the functions of the Administrator dependent upon the fortuitous circumstance of what records a particular institution happened to retain. Not only would this vary from institution to institution, but it would place a premium upon the prompt destruction of records more than 3 years old and impose a penalty upon those who retained any records beyond that period.

Surely an interpretation which would result in so uneven, unfair and fortuitous an administration of the functions of the Administrator of Veterans' Affairs is powerful evidence of its incorrectness. The position taken by appellee—approved by the Court below [R. 70-71, 76-

77]—and pursuant to which it has acted throughout, would result in an equal and even administration of the statute among all educational institutions similarly situated.

The District Court was thus correct in determining that the provisions of Sections 131 and 133, Title 38, U. S. C., relating to the production of books, papers, records, and other documentary evidence or material for investigation or audit, are limited by the terms of Veterans Administration Regulation 10672 (38 C. F. R. 21.672) with respect to the books, papers, records and documentary evidence and material described in said Regulation. [R. 70-71.] Since the subpoena *duces tecum* issued by the Veterans Administration requires the production of records beyond the period provided for in said Regulation, it exceeded the lawful authority of the Veterans Administration, and its judicial enforcement was properly denied.

C. The District Court Lacked Jurisdiction to Issue the Order Sought by the Administrator of Veterans' Affairs.

The Petition for Order to Require Production of Documents filed below on behalf of the Veterans Administration [R. 3-9] goes far beyond the production of the books and records described in the subpoena *duces tecum*. Thus, the first prayer of the Petition requests an order for the indefinite impounding of all of the documents and records referred to in the subpoena until they have been inspected, examined, and completely audited by the Veterans Administration. No limitation of time is provided. So broad and indefinite an order was clearly not warranted by any of the facts before the Court below, nor author-

ized by the provisions of Section 133 of Title 18, U. S. C., pursuant to which the instant proceeding was allegedly brought.

The second prayer of the Petition sought an injunction restraining appellee, and anyone acting on appellee's behalf, from destroying, tampering with, removing, or otherwise disposing of the described records and documents. [R. 8.] Nothing in the record before the District Court could be said to justify the issuance of such an injunction. The Court below, on the record before it, was fully justified in refusing to grant such an injunction.⁸

The final prayer of the Petition is the one which seeks an order requiring appellee to produce and make available for inspection by the Veterans Administration the records and documents described in the subpoena *duces tecum*. [R. 9.] There is serious doubt as to the statutory authority or jurisdiction of the District Court to issue such an order even if it were not as oppressive and unreasonable as this one is.

The Petition recites, as we have said, that it is filed pursuant to Section 133 of Title 38 of the United States Code. [R. 8.] That section provides, in substance, that

⁸Appellants' gratuitous warning that despite the denial of its Petition below appellee college has "handled at its own peril" (App. Br. 23) such of its old records as it may have had at the time of the proceeding below [R. 34], is based upon language in the opinion in *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 17-18 (1936). But the principle there stated applies in terms where a temporary injunction has been denied, but the suit for a permanent injunction is still pending. That is far different from the situation obtaining here. In this case the Petition seeking impounding of records and an injunction to prevent their disposition was finally denied by the District Court. [R. 72.] No order seeking to preserve the *status quo* pending appeal was sought or issued.

when any person refuses to obey a subpoena issued by the Administrator of Veterans' Affairs, the agency may seek the aid of any District Court in requiring the attendance and testimony of witnesses and the production of documentary evidence. However, the significant portion of the statute, in our view, is that which follows. The statute goes on to provide that such Court in such case of refusal to obey a subpoena "may . . . issue an order requiring such . . . person to appear or to give evidence touching the matter in question;" Not only is the statute wholly silent on any authority in the Court to order the impounding of documents or to restrain their disposition, but it does not, in terms, authorize the issuance of an order to require their production.

Appellee appeared in response to the order of the District Court and by filing its reply and the affidavits attached thereto, gave "evidence touching the matter in question." It is appellee's contention that the giving of evidence which the District Court is authorized to order by the statute does not include the production of documents, but relates entirely to the giving of testimony.

Examination of other statutes which authorize the issuance of administrative subpoenas and provide for their judicial enforcement in the event they are not obeyed, buttresses this conclusion. In all of the statutes referred to by appellant (App. Br. 10, n. 6) careful distinction is made between the giving of evidence or testimony and the production of books and records. In each case, unlike the statute here involved, the Court is specifically given authority to issue an order compelling *both* the giving of testimony *and* the production of records.

Thus, the Civil Aeronautics Act of 1938, 49 U. S. C. 644(d) provides that the appropriate court may "issue an order requiring such person to appear before the Board (and produce books, papers or documents if so ordered) and give evidence touching the matter in question; . . .". The Interstate Commerce Commission Act, 49 U. S. C. 12(3) contains precisely the same provision. This careful distinction between the giving of evidence and the production of books and records is certainly a strong indication that in the view of Congress neither includes the other.

The Emergency Price Control Act of 1942, 50 U. S. C. App. 922(c), the Fair Labor Standards Act, 29 U. S. C. 209, the Federal Power Act, 16 U. S. C. 825f(c), the Public Utilities Holding Company Act of 1935, 15 U. S. C. 79r(d), the National Labor Relations Act, 29 U. S. C. 161(2), the Securities and Exchange Commission Act of 1934, 15 U. S. C. 78u, and the Federal Trade Commission Act, 15 U. S. C. 49, 50, all establish the same dichotomy between the production of records and the giving of testimony.

While the absence in this statute of power in the courts to order production of records may represent a hiatus in the statute, and a gap in the grant of authority to the courts to which application is made for the enforcement of subpoenas issued by the Administrator of Veterans' Affairs, nevertheless, in the absence of a grant of such jurisdiction, none exists.

It is thus submitted that the statute upon which appellant relied below did not authorize the District Court to issue any of the orders which appellant sought. The Court, being without jurisdiction, properly denied the Petition.

VII.

Conclusion.

Appellee's brief may perhaps best be closed by setting forth the vigorous statement of principles which we deem controlling here made by Chief Justice Hutcheson concurring specially in *McComb v. Hunsaker Trucking Contractor*, 171 F. 2d 523, 525 (C. A. 5, 1949), and which is particularly appropriate here in view of appellant's insistence upon a "plenary" administrative subpoena power:

"I concur in the result and with all that is said in the opinion. In view, however, of *the over-emphasis in the argument upon stark power*, the under-emphasis upon the citizen's constitutional rights when the cause was submitted to us, I desire to add a few words. . . .

"Whenever then a citizen and a government agency are in conflict in the courts, three paramount considerations must be ever kept in mind. These are (1) 'Arbitrary power and the rule of the Constitution cannot both exist'; (2) the burden is on the agency to establish, not upon the citizen to overthrow, the agency's claim of power; and (3) a court must not permit its writs and decrees to be written large for it, it must frame them for itself precisely and with the utmost care. *If its writs and decrees are framed under Constitutional principles to grant the necessary relief, avoiding not only harsh and oppressive, but unnecessary and unreasonable, restraints and compulsions, neither agency nor citizen may complain. For more than this cannot be required of a citizen. Less than this will not suffice.*" (Emphasis supplied.)

For all of the foregoing reasons, it is submitted that the Court below did not commit error in denying the order sought by appellant and that its judgment should therefore be affirmed.

Respectfully submitted,

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No. 14057

**In the United States Court of Appeals
for the Ninth Circuit**

**L. C. CHAPMAN, MANAGER OF THE REGIONAL OFFICE OF
THE VETERANS' ADMINISTRATION, APPELLANT**

v.

MAREN ELWOOD COLLEGE, APPELLEE

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

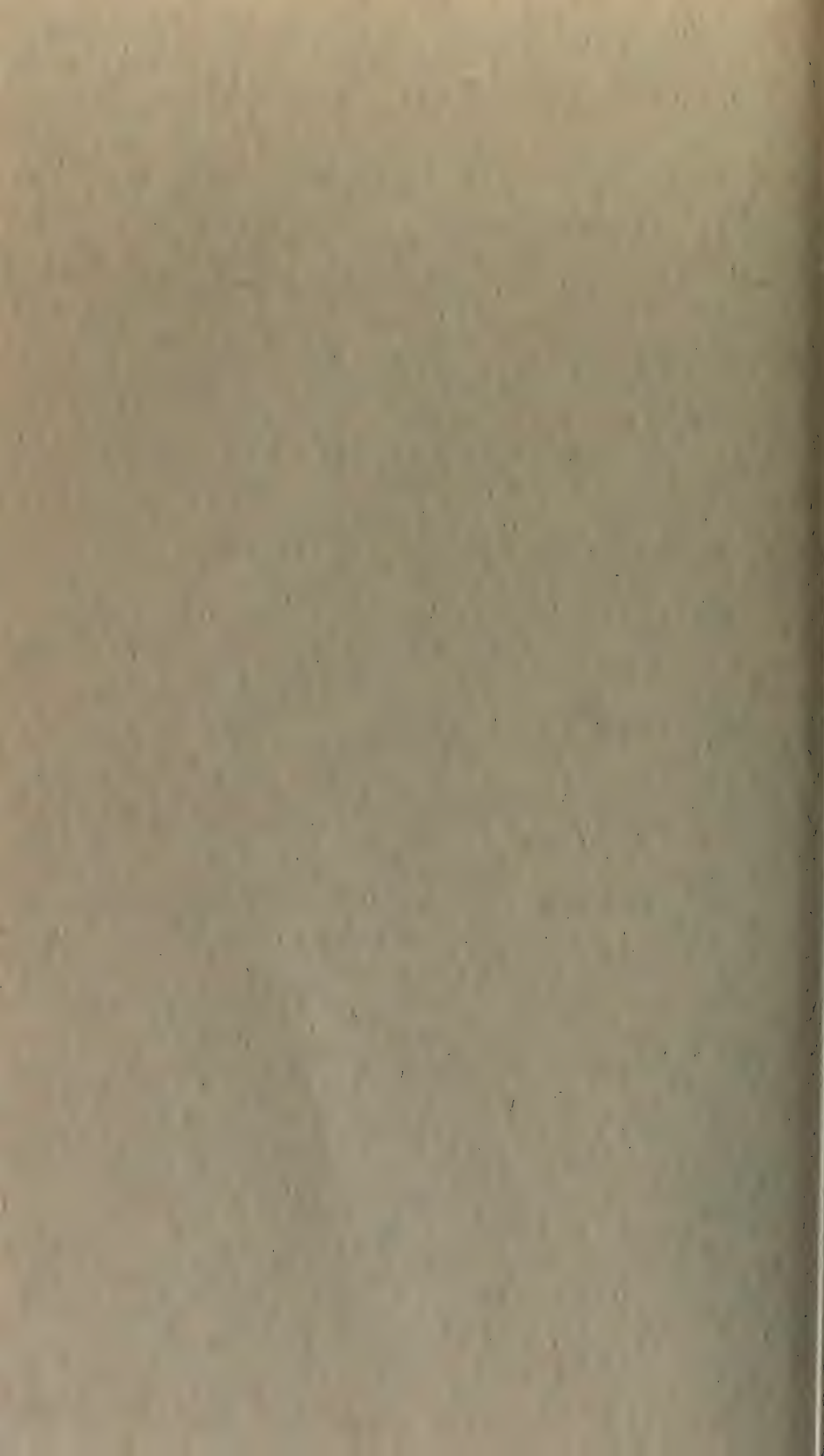
REPLY BRIEF FOR THE APPELLANT

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REPLY BRIEF FOR THE APPELLANT

The decision of the District Court denying enforcement of the Veterans Administration subpoena *duces tecum* was based solely on the ground that Regulation 10672 deprived the agency of its statutory subpoena power over records retained by an educational institution for longer than three years. Appellee's brief, however, attempts to shift the main focus of appellate review to the question of the reasonableness of the exercise of the subpoena power in this case. We do not dispute this Court's right to pass on that point; however, since our main brief concerned itself almost exclusively with an analysis of the regulation in question, the sole issue ruled on by the District Court, we desire to amplify our position with respect to appellee's contentions concerning judicial criteria for determination of the "reason-

ableness" of an administrative subpoena and the application of those criteria to the facts of the present case. Although the subpoena in question qualifies even under the criteria for reasonableness set forth by appellee, we submit that appellee's standards for reasonableness are not supported by present judicial opinion.

Apparently both appellant and appellee consider *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, the latest authoritative decision on judicial enforcement of administrative subpoenas. Appellee ascribes to that decision a holding that four elements are necessary to constitute the exercise of the subpoena power "reasonable" and, therefore, subject of judicial enforcement. Three of those elements have already been mentioned by appellant in its main brief; authority to conduct the investigation, relevancy of the materials sought and specificity of demand. Appellee reads into the *Oklahoma Press Publishing Co.* decision a fourth requirement, namely that the breadth or scope of an administrative subpoena must not be excessive. And it is with this element that appellee's principal attack on the subpoena in question lies for appellee does not contest the Veterans' Administration's authority to investigate, the relevancy of the materials sought, or the specificity of demand.

It is at least questionable whether the *Oklahoma Press Publishing Co.* case does set up breadth as a fourth criterion by which to measure the "reasonableness" of an administrative subpoena seeking judicial enforcement. The Supreme Court had occasion to examine the problem of judicial enforcement of administrative subpoenas more recently in *United States v. Morton Salt Co.*, 338 U.S. 632, and in passing on criteria

for "reasonableness" the Court confined its attention to the three factors stressed by appellant saying:

Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *Federal Trade Comm'n v. American Tobacco Co., supra*. But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant. "The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable". *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208. (333 U.S. at 652-653.)

The above observation by the Supreme Court would indicate that breadth is not an independent criterion for measuring a subpoena's reasonableness, but is rather a combination of the first three criteria stressed by appellant.

Assuming, however, that reasonableness in breadth or scope does constitute an independent fourth factor to be satisfied before a court will enforce an administrative subpoena, the exact meaning of that term does not emerge from the Supreme Court decision relied on by appellee. The *Oklahoma Press Publishing Co.* opinion uses the word "breadth" in several different contexts. (327 U.S. 186, 207, 208, 209.) What that case appears to mean by breadth or scope is that the documents required to be produced by the subpoena should be adequate for but should not exceed the purposes of the proposed inquiry. Thus as stated by the Supreme Court:

* * * the requirement of reasonableness, including particularity in (description) * * * comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry. (327 U.S. at 209.)

In that analysis, measuring the proper breadth or scope of an administrative subpoena is as much a determination of relevance as of adequacy, for the adequacy of a subpoena's scope is principally dependent upon its coverage of all documents relevant to the matter under investigation; certainly nothing less than an examination of all documents relevant to an authorized inquiry may be deemed an adequate discharge of the agency's investigative duty.¹ That relevance is a vital key to breadth is more sharply pointed up by the statement of this Court in *Detweiler Bros. v. Walling*, 157 F. 2d 841, 843 (C.A. 9), certiorari denied, 330 U.S. 819:

The only limitation upon the scope of the Administrator's inquiry is that the records demanded be reasonably relevant to the matter in issue.

¹ An excellent and authoritative discussion concerning limitations on breadth and relevancy in judicial enforcement of subpoenas is contained in Davis, *Administrative Law*, pp. 109-115. The writer there shows clearly how more recent Supreme Court and court of appeals decisions have overruled conceptions concerning limitations on breadth found in such cases as *Hale v. Henkel*, 201 U.S. 43; and *F.T.C. v. American Tobacco Co.*, 264 U.S. 294, relied on by appellee (Appellee's Br. pp. 21, 28) and how present judicial thinking has centered on the relevance factor. See especially *United States v. Morton Salt Co.*, 338 U.S. 632, 652.

Appellee does not contest the relevance of the records sought to the matter under investigation, and it cannot validly claim that anything less than a complete audit will be adequate to uncover the full extent of the overcharges. Instead, appellee emphasizes the possible inconvenience to it in making such a thorough investigation and suggests that prior investigations by State and Federal agencies eliminated the necessity for this Veterans Administration audit (Appellee's Br. pp. 18-29). The fact is, however, that the General Accounting Office audit relied on by appellee resulted in a report indicating an overpayment with respect to certain phases of the school's veterans training program and in particular the cost data submitted by the school. (R. 51-52.) This factor alone clearly indicated that a comprehensive audit was required in the public interest, for the agency could not ignore the very real possibility that such overcharges extended back through a period beginning in October, 1945.

In these circumstances the Veterans' Administration is compelled to investigate fully no matter how voluminous the pertinent records are, as long as those records are relevant, and therefore necessary to a full discovery of the extent of the overcharges; respect for its statutory duties and the public treasury admit of nothing less. The alternatives are to let the overcharges stand or to project the results of a more limited investigation. The former course is inconsistent with the agency's responsibilities concerning the proper expenditure of public funds, and appellee vehemently objects to the latter course. Surely appellee cannot have it both ways, denying the Government access to sufficient records to make a complete and accurate audit and also denying

the Government the right to project the overcharges which its limited audit has already uncovered.²

The fact that enforcement of this subpoena may subject appellee to some inconvenience and expense is no defense "when the subpoena is issued and enforced according to law," (*Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 217) and appellee itself concedes that any expense, inconvenience, or dislocation which might be involved for it should this subpoena *duces tecum* be judicially enforced are not determinative in passing on the reasonableness of the subpoena (Appellee's Br. p. 23). Furthermore it is not evident that any alleged "staggering burden" (Appellee's Br. p. 23) would be imposed on appellee. Appellee's argument that as much as eight and one-half years might be required for examination of its records beginning with October 16, 1945, is based upon the erroneous assumption that the Veterans Administration Finance Audit team spent all day of every day from April 14, 1952, to February 18, 1953, examining the school's records. This, of course, is not true (R. 51). Furthermore, the audit team spent the first two months of its audit verifying the accuracy of the prior General Accounting Office overpayment report (R. 52). That no undue burden would actually result from compliance with the sub-

² Appellee makes much of the fact that the reach of the Veterans Administration subpoena will not be uniform under appellant's theory because some schools will destroy records after three years and some will not. The above "defect" is actually immaterial since lack of uniformity is inherent in the nature of any subpoena *duces tecum* and the same "defect" applies to judicial discovery procedure under the Federal Rules of Civil Procedure, which the District Court proposed as an alternative to the present administrative subpoena (R. 75, 77, 80). That alleged "defect" has certainly never been a ground for judicial refusal to compel production of relevant records. Other motives compel a business to retain records; if records are available the subpoena reaches them, if unavailable, it does not.

poena is further emphasized by the fact that examination of the records is proposed to be held at the school itself. No more than designating the relevant files, so as to identify the records, would be necessary on the part of the school personnel in the conduct of the audit (R. 52). Compare *Bank of America Nat. Trust and Savings Ass'n. v. Douglas*, 105 F. 2d 100 (C.A. D.C.).³

Excessiveness or adequacy in the breadth of a subpoena is in the final analysis a matter for case by case decision. In the present case in light of the overcharges already uncovered by the General Accounting Office audit and the limited Veterans Administration audit, relevant records extending as far back as October 16, 1945, are necessary to discover the full extent of the overcharges.

Finally, although appellant does not contest this Court's right to affirm the District Court on a ground other than that which was the basis of the decision below we suggest that the procedure followed by the Court of Appeals for the Fifth Circuit in a similar situation in *N.L.R.B. v. Anchor Rome Mills*, 197 F. 2d 447, 449-450 is particularly in point. In that case, the district court, although the question of the reasonableness of the administrative subpoena had been raised, based its denial of enforcement on the ground that the agency lacked the power to issue the subpoena. (103 F. Supp. 44.)

³ Compare also, *Johnson Packing Co. et al. v. N.L.R.B.*, 204 F. 2d 842 (C.A. 5), wherein the court of appeals affirmed the district court's enforcement of an administrative subpoena on the basis of statements by representatives of the Board that in respect to the books, records and papers called for by the subpoena the Board would make its examination at such times and places and under such circumstances as would cause the least possible annoyance or interruption to appellant's business. However, a right was reserved to appellant to apply to the district court for relief if it appeared that in securing the information sought the Board was using or proposing to use the subpoena oppressively or unreasonably.

The court of appeals reversed the district court holding that the Labor Board did have the power to issue the subpoena in question. At the same time the Fifth Circuit refused to go into the question of the reasonableness of the subpoena holding that the latter issue was not before it because of the action of the court below, implying that the question of "reasonableness" was one for the primary consideration of the district court.

CONCLUSION

For the reasons stated above and in our main brief, it is respectfully submitted that the judgment of the District Court should be reversed and the Veterans Administration petition for an Order to Require Production of Documents should be granted.

WARREN E. BURGER,
Assistant Attorney General,

LAUGHLIN E. WATERS,
United States Attorney,

PAUL A. SWEENEY,
MARCUS A. ROWDEN,
Attorneys,
Department of Justice.

No. 14059

United States
Court of Appeals
for the Ninth Circuit

E. S. SHIPP,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

NOV 24 1953

No. 14059

**United States
Court of Appeals**
for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

RAYMOND V. HAUN, ESQ.

HENRY SCHAEFER, JR., ESQ.

DEXTER D. JONES, ESQ.

E. J. CALDECOTT, ESQ.

For Respondent:

W. P. FLYNN, ESQ.

The Tax Court of the United States

Docket No. 36769

E. S. SHIPP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

5/11/53 Reassigned to Judge Murdock.

1951

Sept. 17—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 18—Copy of petition served on General Counsel,

Sept. 17—Request for hearing in Los Angeles filed by taxpayer. 9/25/51 Granted.

Oct. 1—Entry of appearance of Henry Schaefer, Jr., as counsel filed.

Oct. 1—Entry of appearance of Dexter D. Jones as counsel filed.

Oct. 1—Entry of appearance of E. J. Caldecott as counsel filed.

Oct. 30—Answer filed by General Counsel.

Nov. 6—Copy of answer served on taxpayer, Los Angeles.

1952

Nov. 28—Hearing set January 19, 1953, Los Angeles, California.

1953

Jan. 23—Hearing had before Judge Bruce, on merits. Stipulation of facts with attached ex-

1953

hibits 1 thru 4 filed. Petitioner's brief due March 9, 1953. Respondent's brief due April 8, 1953. Petitioner's reply due 5/8/53.

Feb. 18—Transcript of hearing 1/23/53 filed.

Mar. 6—Brief filed by taxpayer. Copy served.

Apr. 8—Answer brief filed by General Counsel.

Apr. 29—Reply brief filed by taxpayer. Copy served.

June 15—Memorandum opinion rendered, Murdock, Judge. Decision will be entered for the respondent. Copy served.

June 19—Decision entered, Judge Murdock, Div. 3.

Aug. 24—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by petitioner.

Sept. 2—Proof of service filed by petitioner.

The Tax Court of the United States
Docket No. 36769

E. S. SHIPP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency LA:IT:90D:CTF dated August 13, 1951, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with residence at 15000 La Cumbre Drive, Pacific Palisades, California. The return for the period here involved was filed with the collector for the sixth district of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 13, 1951.

3. The deficiencies as determined by the Commissioner are in income taxes for the calendar year 1949 in the amount of \$1,451.42 of which approximately \$1,326.42 is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(A) In computing the income of the petitioner for the taxable year ended December 31, 1949, the Commissioner erred in disallowing as miscellaneous deductions attorneys' fees and expenses in the amount of \$1,900.00 and accounting services of \$675.00, incurred by the petitioner and which said fees and expenses were necessary for the conservation of property held for the production of income.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(A) The petitioner was an officer and majority stockholder in five different corporations.

(B) That on or about August 27, 1948, Ellsworth Wood, as Executor of the Estate of Elaine Shipp, deceased, the former wife of petitioner herein, filed an action against the petitioner. That said action was for declaratory relief, accounting and to quiet

title. That said Ellsworth Wood in said action asked for a receiver to be appointed to take over petitioner's property, as well as the five corporations.

(C) During the year 1949 the petitioner to defend the said action paid expenses amounting to \$2,575.00 for accounting and legal services.

(D) That said expenses were necessarily incurred and paid by the petitioner to maintain, protect and conserve his property.

(E) The deficiency determined by the respondent is based upon a computation of the petitioner's net income for 1949, in which computation said fees and expenses or any part thereof have not been deducted as miscellaneous deductions.

Wherefore , petitioner prays this Court may hear the proceedings and determine:

(A) That there is no deficiency due from petitioner for the year 1949.

(B) That the Court may grant such other and further relief as the nature of the case may warrant.

/s/ E. S. SHIPP,
Petitioner,

RAYMOND V. HAUN,
HENRY SCHAEFER, JR.,
E. J. CALDECOTT,
DEXTER D. JONES,

By /s/ RAYMOND V. HAUN,
Counsel for Petitioner.

State of California,
County of Los Angeles—ss:

E. S. Shipp, being duly sworn, says that he is the petitioner above-named; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ E. S. SHIPP.

Subscribed and sworn to before me this 6th day of September, 1951.

[Seal] /s/ H. T. ROBINSON,
Notary Public in and for Said
County and State.

EXHIBIT A

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Aug. 13, 1951.

Office of
Internal Revenue Agent in Charge
Los Angeles Division
LA:IT:90D:CTF

Mr. E. S. Shipp,
15000 La Cumbre Drive,
Pacific Palisades, California.

Dear Mr. Shipp:

You are advised that the determination of your in-

come tax liability for the taxable year ended December 31, 1949, discloses a deficiency of \$1,451.42, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4 D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,

Commissioner,

By GEORGE D. MARTIN,

Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of Waiver

Statement

LA:IT:90D:CTF

Mr. E. S. Shipp
15000 La Cumbre Drive
Pacific Palisades, California

Tax Liability for the Taxable Year
Ended December 31, 1949

	Deficiency
Income Tax	\$ 1,451.42

In making this determination of your income tax liability careful consideration has been given to the report of examination dated May 24, 1951.

Adjustments to Net Income

Net income as disclosed by return	\$22,495.34
Unallowable deductions and additional income:	
(a) Miscellaneous expenses disallowed	2,575.00
(b) Dividends increased	250.00
	<hr/>
Net income adjusted	\$25,320.34

Explanation of Adjustments

(a) In your return you claimed miscellaneous deductions of \$2,575.00 (attorney fees and expenses \$1,900.00 and accounting services \$675.00) in connection with a law suit brought against you by the executor of your wife's estate for determination of community property interests. These expenditures are personal in nature and do not represent an allowable deduction under section 23(a) of the Internal Revenue Code. Section 24(a), I.R.C.

(b) It has been determined that you received dividends of \$500.00 from the California Bank in lieu of \$250.00 reported, an increase in income of \$250.00.

Computation of Alternative Tax

Net income adjusted	\$25,320.34
Less: Excess of net long-term capital gain over net short-term capital loss	654.28
	<hr/>
Ordinary net income	\$24,666.06
Less: Exemption	600.00
	<hr/>
Balance, subject to surtax and normal tax	\$24,066.06

Tentative surtax	\$8,877.00	
Tentative normal tax at 3%	721.98	
		<hr/>
Total tentative tax	\$9,598.98	
Less reduction under Section 12(c), I.R.C.	1,171.88	
		<hr/>
Partial tax		\$ 8,427.10
Plus: 50 per cent of \$654.28		327.14
		<hr/>
Alternative tax		\$ 8,754.24
Computation of Tax		
Net income adjusted		\$25,320.34
Less: Exemption		600.00
		<hr/>
Balance, subject to surtax and normal tax		\$24,720.34
Tentative surtax	\$9,243.39	
Tentative normal tax at 3%	741.61	
		<hr/>
Total tentative tax	\$9,985.00	
Less reduction under Section 12(c), I.R.C.	1,218.20	
		<hr/>
Total normal tax and surtax		\$ 8,766.80
Alternative tax		\$ 8,754.24
Correct income tax liability		\$ 8,754.24
Income tax liability shown on return, Ac- count No. 3202812		\$ 7,302.82
		<hr/>
Deficiency of income tax		\$ 1,451.42

Received and filed September 17, 1953, T.C.U.S.

Served September 18, 1951.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the deficiencies as determined by the Commissioner are in income taxes for the calendar year 1949 in the amount of \$1,451.42; denies the remaining allegations contained in paragraph 3 of the petition.

4.(A). Denies the allegations of error contained in subparagraph (A) of paragraph 4 of the petition.

5.(A) to (D), inclusive. Denies the allegations contained in subparagraphs (A) to (D), inclusive, of paragraph 5 of the petition.

(E). Admits the allegations contained in subparagraph (E) of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
W. P. FLYNN, JR.,
Special Attorneys, Bureau of
Internal Revenue.

Received and Filed October 30, 1951, T.C.U.S.

[Title of Tax Court and Cause.]

MINUTES OF PROCEEDINGS—JAN. 23, 1953

Filed at hearing: Stipulation of facts with attached exhibits 1 thru 4.

Petitioner's brief: March 9, 1953—Reply May 8, 1953.

Respondent's brief: April 8, 1953.

Exhibits:

Respondent's: A—Income tax return, 1949.

ROBERT I. BOWLES,
Deputy Clerk.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective counsel, that the facts herein stated shall be taken as true, provided, however, that this Stipulation shall be

without prejudice to the right of either party to introduce upon the trial of this case any other and further evidence not inconsistent with the facts herein stipulated.

1. The Petitioner is an individual with residence at 15000 La Cumbre Drive, Pacific Palisades, California, who filed his income tax return for the year 1949 with the Collector for the Sixth District of California, Los Angeles, California. The return was filed upon a cash receipts and disbursements basis.

2. That the Petitioner and Elaine Shipp were married on or about April 11, 1940, and that said marriage was terminated by the death of said Elaine Shipp on July 27, 1948.

3. That on the 27th day of August, 1948, Ellsworth Wood, as Executor of the Estate of Elaine Shipp, Deceased, Plaintiff, filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 549151, against Petitioner, Everett S. Shipp, Everett A. Shipp, Robert L. Shipp, Metropolitan Finance Corporation, a corporation, Metropolitan Finance Corporation of California, a corporation, Chesley Finance Corporation, a corporation, Summit Realty Corporation, a corporation, Investors Realty Corporation, a corporation.

4. The Complaint in said action No. 549151 was for declaratory relief, to quiet title, and seeking the appointment of a Receiver to take charge of and administer the properties and assets of said defendants. A copy of said Complaint, marked Exhibit 1, is attached hereto and made a part hereof, and among other things Ellsworth Wood, as Ex-

ecutor of the Estate of Elaine Shipp, Deceased, alleged that stock in various corporations was community property, and in particular as follows:

All of the shares of stock of Investors Realty Corporation and Summit Realty Corporation;

2,500 shares in Metropolitan Finance Corporation of California;

1,500 shares in Metropolitan Finance Corporation; and

1,500 shares in Chesley Finance Corporation;

Bank deposits in the following banks:

California National Bank, Santa Monica;

Citizens National Trust and Savings Bank of Los Angeles, California;

Security First National Bank of Los Angeles;

Bank of America, National Trust and Savings Association;

and other property as follows:

Lot and house at 641 Toyopa Drive, Pacific Palisades, California;

Furniture and furnishings;

Insurance and annuity policies;

Stocks, bonds and monies;

Note recured by a Deed of Trust on the home and lot situated at 176 South Fuller Street, Los Angeles, California;

Club membership in the following clubs:

Los Angeles Athletic Club;

Los Angeles Country Club;

Del Mar Country Club.

5. Among other things the Executor alleged in said Complaint that there was an increase in Petitioner's equity in the several corporations since Petitioner's marriage to said Elaine Shipp in the amount of Two Hundred Fifty Thousand (\$250,000) Dollars, and that this increase constituted community property.

6. That your Petitioner employed J. Edward Haley, an attorney licensed to practice in all of the Courts of the State of California, to represent him in the action filed, and said attorney then filed an Answer in behalf of your Petitioner, a true copy of said Answer, marked Exhibit 2, being attached hereto and made a part hereof, and alleged that his stock ownership in the various corporations involved was as follows:

Corporation: Metropolitan Finance Corporation.

Stock Owned: 84%.

Position Held: President and Director.

Corporation: Metropolitan Finance Corporation of California.

Stock Owned: 16%.

Position Held: President, General Manager and Director.

Corporation: Investors Realty Corporation.

Stock Owned: 100%.

Position Held: President and Director.

Corporation: Chesley Finance Corporation.

Stock Owned: 96%.

Position Held: President and Director.

Corporation: Summit Realty Corporation.

Stock Owned: 4%.

Position Held: None.

7. The Petitioner caused the organization of the five corporations involved in the action and was an officer and stockholder in said corporations as set forth in Paragraph 6, page 3, hereof. The said corporations and dates of organization are as follows:

Corporation	Organized
Investors Realty Corporation.....	1945
Summit Realty Corporation.....	1947
Metropolitan Finance Corporation of California.....	1940
Metropolitan Finance Corporation.....	1940
Chesley Finance Corporation.....	1940

8. That the balance on deposit July 27, 1948, in Citizens National Trust & Savings Bank, Leimert Park Branch, is the total sum of \$183.88 and the balance on reposit July 27, 1948, in the California National Bank, Santa Monica Branch, was the total amount of \$158.73. That there was no record of any bank deposits in the Security First National Bank of Los Angeles or the Bank of America, National Trust & Savings Association.

9. That the Lot and House at 641 Toyopa Drive, Pacific Palisades, California, and the Cadillac automobile involved in the action were in the name of the Metropolitan Finance Corporation.

10. That the other Defendants were represented by their respective attorneys as follows:

Investors Realty Corporation by J. Edward Haley, Esq.;

Everett A. Shipp, Robert L. Shipp, and Summit Realty Corporation by J. Edward Haley, Esq.;

Chesley Finance Corporation by Messrs. MacFarlane, Schaefer & Haun;

Metropolitan Finance Corporation of California by Messrs. MacFarlane, Schaefer & Haun;

Metropolitan Finance Corporation by Messrs. MacFarlane, Schaefer & Haun.

11. That your Petitioner was successful in the defense of the action and judgment was entered in Petitioner's favor after the taxable period involved herein, to wit, March 9, 1950, except for property that was not in dispute by your Petitioner, a copy of said Judgment, marked Exhibit 3, being attached hereto and made a part hereof.

12. That said action was appealed by the said Executor to the U. S. District Court of Appeal, Second District, Division 1, California, after the taxable period involved herein, cited as *Wood v. Shipp*, 233 P 2d 193, wherein said judgment was affirmed, copy of which is attached to the original hereof and marked Exhibit 4.

13. That the income tax return involved herein, to wit, taxable year 1949, showed gross income in the amount of Thirty Thousand Four Hundred Twenty-four and 80/100 (\$30,424.80) Dollars, that of this amount, Petitioner received income from the various corporations as follows:

Metropolitan Finance Corporation of California:

Salary	\$9,000.00	
Expense allowance	524.15	
Interest on loan	208.57	
Director's fees	70.00	
Dividends	2,409.40	
<hr/>		
Total		\$12,212.12

Metropolitan Finance Corporation:

Director's fees	\$ 10.00	
Dividends	5,618.75	
<hr/>		
Total		5,628.75

Chesley Finance Corporation:

Salary	\$3,600.00	
Dividends	4,551.26	
<hr/>		
Total		8,151.26

Investors Realty Corporation:

Salary	\$1,800.00	
Interest on loan	201.50	
<hr/>		
Total		2,001.50

Total income from all corporations	\$27,993.63
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14. That your Petitioner paid to his attorney, J. Edward Haley, during the taxable year of 1949, in defense of the said action filed by the said Executor of the Estate of Elaine Shipp, the sum of Nineteen Hundred (\$1,900) Dollars, and to Charles Hugh Wright, a certified public accountant, for accounting services rendered in defense of said action, the sum of Six Hundred Seventy-five (\$675) Dollars, or a total amount of Two Thousand Five Hundred Seventy-five (\$2,575) Dollars.

15. That for the said calendar year of 1949, your

Petitioner deducted the sum of Two Thousand Five Hundred Seventy-five (\$2,575) Dollars as a miscellaneous deduction as expenses paid in connection with the management, conservation or maintenance of property held for the production of income. The Commissioner of Internal Revenue by Notice of Deficiency dated August 13, 1951, determined a deficiency of One Thousand Four Hundred Fifty-one and 42/1000 (\$1,451.42) Dollars in Petitioner's income tax liability based in part on a disallowance as a miscellaneous deduction the said amount of Two Thousand Five Hundred Seventy-five (\$2,575.00) Dollars.

16. That the increase of adjusted net income in the amount of Two Hundred Fifty (\$250.00) Dollars, as dividends from the California Bank, and as determined by the Commissioner in the Statutory Notice of Deficiency from which this appeal is taken, is correct, and that part of the deficiency herein determined by the Commissioner which is due to the adjustment is correct and uncontested.

Dated: January 7, 1953.

/s/ DEXTER D. JONES,

Of Counsel:

RAYMOND V. HAUN,
HENRY SCHAEFER, JR.,
E. J. CALDECOTT,
Attorneys for Petitioner.

/s/ CHARLES W. DAVIS ECC,
Chief Counsel, Bureau of Internal Revenue.

EXHIBIT 1

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 549151

ELLSWORTH WOOD, as Executor of the Estate
of Elaine Shipp, Deceased,

Plaintiff,

vs.

EVERETT S. SHIPP, EVERETT A. SHIPP,
ROBERT L. SHIPP, METROPOLITAN
FINANCE CORPORATION, a Corporation,
METROPOLITAN FINANCE CORPORA-
TION OF CALIFORNIA, a Corporation,
CHESLEY FINANCE CORPORATION, a
Corporation, SUMMIT REALTY CORPORA-
TION, a Corporation, INVESTORS REALTY
CORPORATION, a Corporation,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF
AND TO QUIET TITLE

Comes Now Plaintiff above named and for cause
of action against the Defendant above named and
each of them alleges as follows:

I.

That Defendants, Everett S. Shipp, Everett A.
Shipp and Robert L. Shipp were, at all times men-
tioned herein, and now are, residents of the County
of Los Angeles, State of California.

II.

That Metropolitan Finance Corporation, Summit Realty Corporation, Chesley Finance Corporation and Investors Realty Corporation were incorporated under the laws of the State of California and each has its principal place of business located at 839 Via de La Paz, Pacific Palisades, Los Angeles County, California.

III.

That Metropolitan Finance Corporation of California was incorporated under the laws of the State of Delaware and it has its principle place of business at 839 Via de La Paz, Pacific Palisades, Los Angeles County, California.

IV.

That on the 27th day of July, 1948, Elaine Shipp died testate in the County of Los Angeles, State of California, being a resident at the time of her death of said County; that thereafter, on or about the 27th day of August, 1948, by an order duly given, made and entered in the above-entitled court, Plaintiff, Ellsworth Wood, was appointed Executor of the Estate of Elaine Shipp, deceased, and thereafter, on or about the 27th day of August, 1948, said Ellsworth Wood duly qualified as such Executor and Letters Testamentary were thereupon duly issued to him out of said court, and he has ever since been and is now the duly appointed, qualified and acting Executor of said Estate.

V.

That said Elaine Shipp and defendant, Everett S.

Shipp, were married on or about April 11, 1940, in Las Vegas, Nevada; that said marriage was terminated by the death of said Elaine Shipp on July 27, 1948.

VI.

That during the married life of said Elaine and Everett S. Shipp, they were residents of the State of California and the following property was acquired by said Elaine Shipp and Everett S. Shipp after said persons had intermarried, and said property was acquired through the joint efforts of said persons and/or with community funds and was and is the community property of said Elaine Shipp and Everett S. Shipp:

(1) All the shares of stock in the following corporations:

- (a) Investors Realty Corporation;
- (b) Summit Realty Corporation;

(2) The following shares of stock in the following corporation:

- (a) 2500 shares in Metropolitan Finance Corporation of California;
- (b) 1500 shares Metropolitan Finance Corporation;
- (c) 1500 shares in Chesley Finance Corporation;

(3) Bank deposits in the following banks:

- (a) California National Bank, Santa Monica;
- (b) Citizens National Trust and Savings Bank of Los Angeles, California;

(c) Security First National Bank of Los Angeles;

(d) Bank of America, National Trust and Savings Association;

(4) The lot, and house situated thereon, which is located at 641 Toyopa Drive, Pacific Palisades, California:

(5) Furniture and furnishings in said home at 641 Toyopa Drive, Pacific Palisades, California, which was the home of said Elaine Shipp and Everett S. Shipp, except that listed in Paragraph VII hereof:

(6) Insurance and annuity policies:

(7) Stocks, bonds and monies:

(8) Note secured by a Deed of Trust on the home and lot situated at 176 South Fuller Street, Los Angeles, California:

(9) Club Membership in the following clubs:

Los Angeles Athletic Club;

Los Angeles Country Club;

Del Mar Country Club.

(10) Outstanding loans made to the corporations referred to in subdivisions (1) and (2) of this paragraph.

VII.

That during the marriage of said Elaine Shipp and Everett S. Shipp, the latter gave the former, as an anniversary, wedding or Christmas gift, the following personal property:

(a) Living room oriental rug;

(b) Complete bedroom set, including large

rug, 3x5 oriental rug, lamps, mirror, bric-a-brac, bed, mattress, springs, lamp table, chaise lounge, chest of drawers, dressing table, occasional chair and radio;

(c) Dining room Chinese rose-colored oriental rug;

(d) Sheffield tea and coffee service;

(e) Sterling silver pieces;

(f) Wrist watch;

(g) Wedding and engagement ring;

(h) Coats and other wearing apparel;

(i) 1947 Cadillac automobile.

VIII.

That in addition to the community property listed in Paragraph VI of this complaint, plaintiff has been informed and believes, and upon such information and belief, alleges that said Elaine Shipp and Everett S. Shipp acquired additional community property, during said marriage, in the amount of One Hundred Thousand Dollars (\$100,000.00) under the following circumstances:

That defendant Everett S. Shipp had, during the marriage of Elaine Shipp and Everett S. Shipp, complete control and management of the following corporations and owned and owns the following amounts of stock in said corporation and held and holds the following positions in said corporations:

Corporation: Metropolitan Finance Corporation:

Stock Owned: 85%. Position Held: President,
Director and General Manager.

Corporation: Metropolitan Finance Corporation of California:

Stock Owned: 85%. Position Held: President, General Manager and Director.

Corporation: Investors Realty Corporation:

Stock Owned: 100%. Position Held: President, General Manager and Director.

Corporation: Chesley Finance Corporation.

Stock Owned: 96%. Position Held: President, General Manager and Director.

Corporation: Summit Realty Corporation:

Stock Owned: 100%. Position Held: President, General Manager and Director.

That during the eight (8) years immediately preceding the marriage of said Elaine Shipp and Everett S. Shipp, said Everett S. Shipp received a total salary of Forty-Six Thousand, Five Hundred Dollars (\$46,500.00) from said Metropolitan Finance Corporation; that during the approximate eight (8) years of the marriage of said Everett S. Shipp and Elaine Shipp, he received from said corporation a total salary of Nine Dollars (\$9.00).

That prior to the marriage of said Elaine Shipp and Everett S. Shipp, said Everett S. Shipp received an annual salary of Nine Thousand Dollars (\$9,000.00) from Chesley Finance Corporation; that since 1942 he received an annual salary of Forty-Two Hundred Dollars (\$4,200.00) from said corporation.

That for the eight (8) years immediately preceding the marriage of said Elaine Shipp and Everett S. Shipp, said Everett S. Ship received about

Eighty Thousand Dollars (\$80,000.00) as salary from the Metropolitan Finance Corporation of California; that during the eight (8) years said Elaine Shipp and Everett S. Shipp were married said Everett S. Shipp received about Seventy Three Thousand Dollars (\$73,000.00) as salary from the Metropolitan Finance Corporation of California.

That said Everett S. Shipp never received any salary from Investors Realty Corporation and/or Summit Realty Corporation which were incorporated in 1945 and 1947 respectively.

That said Everett S. Shipp's duties, functions and responsibilities for all of said corporations have remained the same from the date of their incorporation to the date of the death of said Elaine Shipp.

That a reasonable salary for said Everett S. Shipp for services rendered to all of said corporations, during the marriage of said Everett S. Shipp and said Elaine Shipp, was, at least One Hundred Thousand (\$100,000.00) Dollars more than the salary actually received by the said Everett S. Shipp from all of said corporations; that by the failure of said Everett S. Shipp to authorize all of said corporations to pay him a reasonable salary or any salary he has been enable to increase, and he did increase his equity in said corporations by at least One Hundred Thousand (\$100,000.00) Dollars, through increase of reserve and surplus in said corporations, and said Everett S. Shipp was able to take out additional alleged dividends.

IX.

That in addition to the community property re-

ferred to in Paragraphs VI and VIII of this complaint; the plaintiff herein is informed and believes and alleges upon such information and belief that the net increase in said Everett S. Shipp's equity in the corporations, referred to in Paragraph VIII, since April 11, 1940, has been Two Hundred and Fifty Thousand Dollars (\$250,000.00); that such increase in such equity was and is the community property of said Everett S. Shipp and Elaine Shipp.

That all of said corporations were since their creation and during the entire period of the marriage of said Elaine Shipp and Everett S. Shipp, and now are, mere devices and instruments through which said Everett S. Shipp carried on and carries on his business; that the entire profits realized by said corporations during the marriage of said Everett S. Shipp and said Elaine Shipp were realized because and as a result of the personal skill, efforts and management of said Everett S. Shipp; that said Everett S. Shipp had at all of said times, complete control and management of and governed and controlled all of said corporations during the entire period that said Everett S. Shipp and said Elaine Shipp were husband and wife; that the failure of the above-entitled court to disregard the alleged separate entity of all the said alleged corporations would result in a grave injustice to Elaine Shipp and her Estate and Heirs at Law.

X.

That on or about March 8, 1948, defendant Everett S. Shipp purported to give to each of the defendants, Robert L. Shipp, and Everett A. Shipp, 1200

shares of stock in said Summit Realty Corporation; that said defendants, Robert L. Shipp and Everett A. Shipp and each of them, deny that said shares of stock were the community property of said Elaine Shipp and Everett S. Shipp and said defendants and said defendants and each of them refuse to return said 2400 shares of stock or any part thereof to the estate of said Elaine Shipp or to the plaintiff above-named as Executor of said Estate.

XI.

That said defendants, Everett A. Shipp and Robert L. Shipp, and each of them claim that they are the sole owners of said blocks of 1200 shares of stock.

XII.

That said alleged gift of said shares of said stock were made to defendants, Everett A. Shipp and Robert L. Shipp, after said Everett S. Shipp and said Elaine Shipp had separated and ceased to live together as husband and wife and said alleged gift was made without the knowledge or consent of said Elaine Shipp.

XIII.

That upon the death of said Elaine Shipp on the 27th day of July, 1948, all of her right, title and interest in said property was acquired and vested in her Estate or in her Heirs at Law named in her will. That in her Will executed on the 4th day of April, 1948, said Elaine Shipp bequeathed and devised all of her interest in said property to persons other than the defendants above-named; that a copy of

said Will is attached hereto and incorporated as a part hereof as "Exhibit A."

XIV.

That Plaintiff has demanded of Defendants that they turn over the property referred to herein, to him as Executor of the Estate of Elaine Shipp, deceased, on that they recognize and hold said property available for distribution in accordance with the terms of said deceased's will; that there is an actual controversy between the parties hereto as to their respective legal right, duties and interests concerning the property described herein in that said defendants, and each of them, deny that said Elaine Shipp had or that plaintiff and her Heirs at Law, named in said will, have any interest in said property or any part thereof; That said defendants, and each of them, claim such property, and all thereof, as their own separate property; That Plaintiff cannot properly administer the Estate of said Elaine Shipp until the respective interests of the parties hereto, to said property, is declared fixed and determined by this Court.

XV.

That Defendant, Everett S. Shipp, has complete control of each and all of the corporations named as Defendants herein; That most of the stock of said Corporations is personally held by said Everett S. Shipp except that his sons, Everett A. Shipp and Robert L. Shipp, Defendants above named, each hold as hereinbefore set forth, 1200 shares of the Summit Realty Corporation Stock; That the house-

hold furniture and furnishings referred to herein are in the possession of said Everett S. Shipp; That Plaintiff is informed and believes and upon such information and belief alleges that unless a Receiver be appointed these assets will be lost or destroyed and other assets of said Corporations will be dissipated and wasted; that Plaintiff, said Estate and said Heirs at Law would be irreparably injured and without redress if the Defendants would dispose of such assets.

Wherefore, Plaintiff prays for a judgment of this Court, ordering, adjudging, decreeing, and declaring:

(a) That all property, acquired after April 11, 1940, and described in this Complaint which is held in the name of any of the corporate defendants above-named or acquired in the name of said Everett S. Shipp, be fixed, determined and declared to be the community property of said Everett S. Shipp and said Elaine Shipp.

(b) That the 2400 shares of stock in Summit Realty Corporation that was allegedly conveyed to Everett A. Shipp and Robert L. Shipp on or about March 8, 1948, be fixed, determined and declared to be the community property of said Everett S. Shipp and said Elaine Shipp, and that upon the death of said Elaine Shipp it became property held in tenancy in common by said Robert L. Shipp and the Estate of said Elaine Shipp on the one hand and property held in tenancy in common by said Everett A. Shipp and said Estate of Elaine Shipp on the other hand.

(c) That the net increase from April 11, 1940, to July 27, 1948, in the equity in the five corporations, mentioned in Paragraph VIII of the Complaint herein, be fixed, declared and determined to be the community property of said Elaine Shipp and Everett S. Shipp and that upon the death of said Elaine Shipp such property is now held in tenancy in common by the estate of said Elaine Shipp and said Everett S. Shipp or said Everett A. Shipp or Robert L. Shipp.

(d) That it be fixed, determined and declared that said Everett S. Shipp failed to pay himself a reasonable salary for services rendered to each of the corporations named in Paragraph VIII and that if during the marriage of said Everett S. Shipp and Elaine Shipp, a reasonable salary had been paid he would have received One Hundred Thousand (\$100,000.00) Dollars more than he actually received; That such One Hundred Thousand (\$100,000.00) be fixed, determined and declared to be the community property of said Elaine Shipp and Everett S. Shipp and that upon her death it is property held in tenancy in common by said Everett S. Shipp and the Estate of said Elaine Shipp.

(e) That the property referred to in Paragraph VII hereof be fixed, determined, declared and decreed to have been the separate property of said Elaine Shipp and to be the separate property of the Estate of said Elaine Shipp, Deceased;

(f) That it be decreed that all of the property mentioned herein, except the property mentioned

in Paragraph VII hereof was the community property of said Everett S. Shipp and said Elaine Shipp, Deceased.

(g) That it be decreed that Defendants, Everett A. Shipp and Robert L. Shipp, each have a tenancy in common interest in the 1200 shares of stock in Summit Realty Corporation with the Estate and Heirs at Law, designated in her Will, of said Elaine Shipp, Deceased.

(h) That the Defendants, and each of them, be ordered to deliver to Plaintiff herein all of the property described in this complaint in order that he might distribute the same in accordance with Exhibit "A" attached hereto;

(i) That the title of the Plaintiff and the Estate of said Elaine Shipp and her heirs, named in Exhibit "A" attached hereto, be quieted by the decree of this Court as against each, every and all of the claims of said defendants, and each of them and that the respective interests of the parties hereto in and to said property be determined and decreed by this Court.

(j) That a Receiver be appointed with the usual powers and duties and under the usual directions and that the Defendants and each of them, be restrained, during the pendency of this action (1) from paying or collecting any of the loans made by Everett S. Shipp, since April 11, 1940, to any of the five corporate defendants, or to any other person or corporation; (2) from transferring any of the stock in the five corporate defendants held in the name of Everett S. Shipp, Everett A. Shipp

or Robert L. Shipp, or in which they have an interest, (3) from selling, mortgaging, hypothecating, or otherwise disposing of the lot and home at 641 Toyopa Drive, Pacific Palisades, California, or any of the furniture and furnishings located therein, (4) from selling, transferring, mortgaging or otherwise disposing of any of the property mentioned in this Complaint.

(k) For costs of suit herein incurred and for such other and further relief as the court may deem just.

WATERS, ARDITTO AND
WATERS,

By /s/ LAUGHLIN E. WATERS,
Attorney for Plaintiff.

(Note: Exhibit "A", referred to herein is not attached hereto.)

EXHIBIT 2

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 549151

ELLSWORTH WOOD, as Executor of the Estate
of Elaine Shipp, Deceased,

Plaintiff,

vs.

EVERETT S. SHIPP, EVERETT A. SHIPP,
ROBERT L. SHIPP, METROPOLITAN
FINANCE CORPORATION, a corporation,
METROPOLITAN FINANCE CORPORA-
TION OF CALIFORNIA, a corporation,
CHESLEY FINANCE CORPORATION, a
corporation, SUMMIT REALTY CORPO-
RATION, a corporation, INVESTORS
REALTY CORPORATION, a corporation,
Defendants.

ANSWER OF DEFENDANT EVERETT S.
SHIPP TO COMPLAINT

Comes now the defendant, Everett S. Shipp, and
for answer to plaintiff's complaint, admits, denies
and alleges:

I.

This defendant admits the allegations contained
in Paragraphs I, II, III, IV and V.

II.

For answer to Paragraph VI, this defendant ad-
mits that during his married life with Elaine

Shipp, they were residents of the State of California. This defendant denies generally and specifically each and all other allegations contained in said paragraph, and each and every part thereof.

Further answering said paragraph, this defendant alleges that each and all of the property listed in said paragraph which is in his possession or under his control is now and at all times since he acquired said property has been his sole and separate property.

III.

For answer to paragraph VII, this defendant admits that during the marriage of said parties, he gave to his wife Elaine Shipp the following personal property:

(a) Complete bedroom set, including large rug, lamps, bric-a-brac, bed, mattress, springs, table, chest of drawers, dressing table, occasional chair and radio;

(b) Sheffield tea and coffee service;

(c) Wrist watch;

(d) Wedding and engagement ring;

(e) Coats and other personal wearing apparel.

This defendant denies that the balance of the property referred to was given by him to his wife Elaine Shipp, but, on the contrary, alleges that all of said property is his sole and separate property except the 1947 Cadillac automobile, and with respect to said automobile this defendant alleges that said automobile is now and at all times since it was purchased has been the sole and separate property of Metropolitan Finance Corporation of California, a Delaware corporation.

IV.

For answer to Paragraph VIII, this defendant denies generally and specifically that the property listed in Paragraph VI was or is community property of this defendant and Elaine Shipp, and alleges that said property, or such portion thereof which was ever in his possession or which is in his possession now was at all times referred to as his sole and separate property. This defendant denies generally and specifically that Elaine Shipp and he acquired community property during their marriage in the sum of \$100,000.00, or in any sum whatever.

This defendant denies generally and specifically that allegation which alleges that he had complete control and management of the five corporations listed in said paragraph, and denies that his stock ownership in said corporations is as listed in said paragraph, but, on the contrary, alleges that his holdings and possessions as shown by the records of said corporations are as follows:

Corporation: Metropolitan Finance Corporation,
Stock owned: 84%; Position held: President
and Director.

Corporation: Metropolitan Finance Corporation of
California,
Stock owned: 16%; Position held: President,
General Manager and Director.

Corporation: Investors Realty Corporation,
Stock owned: 100%; Position held: President
and Director.

Corporation: Chesley Finance Corporation,
Stock owned: 96%; Position held: President
and Director.

Corporation: Summit Realty Corporation,
Stock owned: 4%; Position held: None.

This defendant denies generally and specifically that during the eight years immediately preceding his marriage to Elaine Shipp, he received a total salary of Forty-six Thousand, Five Hundred Dollars (\$46,500.00) from Metropolitan Finance Corporation, or that during the approximately eight (8) years after the marriage he received a total salary of Nine Dollars (\$9.00).

Further answering said allegation with respect to his salary from Metropolitan Finance Corporation, defendant alleges that during the eight (8) years immediately preceding his marriage to Elaine Shipp, he received a salary of Twenty-one Thousand, Three Hundred Seventy-five Dollars (\$21,375.00). That his salary with said corporation was discontinued March 1, 1939, and that he has received no salary from said corporation since said date.

This defendant denies generally and specifically the allegation in said paragraph that prior to his marriage to Elaine Shipp, he received an annual salary of Nine Thousand Dollars (\$9,000.00) from Chesley Finance Corporation, and further denies that since 1942 he received an annual salary of Forty-two Hundred Dollars (\$4,200.00) from said corporation.

Further answering said allegation, this defend-

ant alleges that he first received a salary from Chesley Finance Corporation for the year 1939 in the amount of Four Thousand Two Hundred Fifty Dollars (\$4,250.00); that in the year 1940, he received a salary of Eight Thousand Five Hundred Dollars (\$8,500.00); that for the year 1941, he received a salary of Nine Thousand Dollars (\$9,000.00) from said corporation; that for the years 1942 to and including the year 1947, he received an annual salary of Three Thousand, Six Hundred Dollars (\$3,600.00).

That although it is alleged that a salary of Eighty-five Hundred Dollars (\$8,500.00) was received from said Chesley Finance Corporation for the year 1940, and the sum of Nine Thousand Dollars (\$9,000.00) as salary for the year 1941, he was required by the Internal Revenue Department of the United States Government to reduce said salary to the sum of Thirty-six Hundred Dollars (\$3,600.00) per year.

Defendant denies that for the eight years immediately preceding his marriage to Elaine Shipp, he received about Eighty Thousand Dollars (\$80,000.00) as salary from Metropolitan Finance Corporation of California and denies generally and specifically that during the eight years he was married to Elaine Shipp he received about Seventy-three Thousand Dollars (\$73,000.00) as salary.

Further answering said paragraph, this defendant alleges that he has received from Metropolitan Finance Corporation of California as salary the sum of Three Thousand Seven Hundred Fifty Dollars (\$3,750.00) in 1940; the sum of Nine Thousand Dollars (\$9,000.00) in 1941; the sum of Seventy-five

Hundred Dollars (\$7,500.00) in 1942 and Nine Thousand Dollars (\$9,000.00) each year commencing in 1942 to and including the year 1947.

That in addition to the salary paid to this defendant by said Metropolitan Finance Corporation of California, he did receive, pursuant to resolution of the Board of Directors, the use of a home located at 641 Toyopa Drive, Pacific Palisades, Los Angeles, California, during the years 1947 and 1948 of the approximate value of \$137.12 per month; the use of a Cadillac automobile and Dodge automobile; payment of club dues at the Los Angeles Athletic Club, Los Angeles Country Club and Del Mar Beach Club. Said dues were paid for the years 1943, 1944, 1945, 1946, and 1947.

This defendant admits that he has received no salary from Summit Realty Corporation, but alleges that he has received a salary from Investors Realty Corporation as of January, 1948, in the amount of One Hundred Fifty Dollars (\$150.00) per month.

This defendant denies generally and specifically that his duties, functions and responsibilities for all of said corporations have remained the same from the date of their incorporation to the date of the death of said Elaine Shipp.

Further answering this allegation, this defendant alleges that his duties, functions and responsibilities are now and at all times during the life of said corporations been subject to the direction and approval of the Board of Directors of said corporations.

This defendant denies that a reasonable salary

for services rendered to all of said corporations during his marriage to Elaine Shipp was at least One Hundred Thousand Dollars (\$100,000.00) more than the salary actually received from all of said corporations or was any more than he has received as salary and benefits from said corporations. This defendant denies generally and specifically the remaining allegations contained in said paragraph referred to, and each and every part thereof.

Further answering said paragraph with respect to said salary, this defendant alleges that the payments of his salary is now and at all times during the existence of said corporation has been subject to the direction and decision of the Board of Directors of said corporation.

V.

For answer to Paragraph IX, this defendant denies generally and specifically the allegation with respect to any reference to community property referred to in Paragraphs VI and VIII, and denies generally and specifically each and all of the allegations with respect to net increase in his equity in the several corporations since April 11, 1940, in the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00).

This defendant denies generally and specifically that any increase in the equity of his holdings was the community property of said Elaine Shipp and Everett S. Shipp, but alleges that if there is any such increase, it is the sole and separate property of said Everett S. Shipp.

Further answering said allegation with respect to any increase in his equity, this defendant alleges that while the books and records of said corporations might indicate an increase in his equity in said corporations, it is difficult to determine what, if any, increase there has been until it has been established the amount of capital tax gain which would have to be paid, the amount realized from liquidation of said corporations, and the cost of liquidating thereof, together with corporate taxes.

This defendant further alleges that if there has been any increase in his equity in said corporations, it was the result of his holdings in said corporations owned by him prior to his marriage to said Elaine Shipp.

This defendant denies generally and specifically each and all of the remainder of the allegations contained in Paragraph IX and each and every part thereof.

VI.

For answer to Paragraph X, this defendant admits that on or about March 8, 1948, he not only purported to give but actually did give to defendants Robert L. Shipp and Everett A. Shipp each, 1,200 shares of stock in Summit Realty Corporation, and this defendant admits that said Robert L. Shipp and Everett A. Shipp deny that said shares were the community property of said Elaine Shipp and this defendant and admit that they refused to return said 2,400 shares of stock, or any part thereof, to the estate of Elaine Shipp or to plaintiff, but deny any obligation on their part so to do.

VII.

For answer to Paragraph XI, this defendant admits that said defendants Robert L. Shipp and Everett A. Shipp, and each of them, claim that they are the sole owners of said shares of stock.

VIII.

For answer to Paragraph XII, this defendant admits that the transfer of said shares of stock to Robert L. Shipp and Everett A. Shipp was made after he had separated from Elaine Shipp. This defendant has no information or belief upon the subject sufficient to enable him to answer the allegations with respect to whether Elaine Shipp had knowledge of the transfer of said shares or whether she gave her consent, and placing his denial upon that ground denies said allegations.

Further answering said paragraph, this defendant alleges that the shares of stock transferred by him to said Robert L. Shipp and Everett A. Shipp was his sole and separate property.

IX.

For answer to Paragraph XIII, this defendant denies generally and specifically the allegation that upon the death of said Elaine Shipp any right, title or interest in any of the property referred to in said complaint, except that property which defendant admits was given to her, was vested in her estate or in her heirs at law named in her will.

This defendant denies generally and specifically the statements contained in said will, marked Ex-

hibit A, in so far as it attempts to establish any community interest, or any right, title or interest in and to the property referred to in the complaint on file, except such property as defendant admits was given to said Elaine Shipp as a gift.

X.

For answer to Paragraph XIV, this defendant admits that plaintiff has made various demands upon him that he recognize that said plaintiff is entitled to an interest in the property he owns, and admits that he has refused to recognize any claims or demands of plaintiff, and admits that he has refused to turn over any property to plaintiff, but denies that there is any obligation on his part so to do.

This defendant denies generally and specifically each and all of the other allegations contained in said paragraph, and each and every part thereof.

Further answering said paragraph, this defendant alleges that there has never been any controversy existing so far as he was concerned in that he has always maintained that each and all of the property described in said complaint is his sole and separate property.

XI.

For answer to Paragraph XV, this defendant denies generally and specifically each and all of the allegations contained in said paragraph, and each and every part thereof, except that he does admit that defendants Robert L. Shipp and Everett A. Shipp each hold 1,200 shares of the capital stock of Summit Realty Corporation.

Wherefore, this defendant having answered prays that plaintiff take nothing by his said complaint; that his request for the appointment of a receiver or for a temporary restraining order or injunction be denied; that this defendant have judgment for his costs, and for such other relief as to the court seems just.

J. EDWARD HALEY,
Attorney for defendant,
Everett S. Shipp.

(Verification.)

[Endorsed]: Filed Sept. 10, 1948. Earl Lippold,
County Clerk; By J. E. Shaw, Deputy.

EXHIBIT 3

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 549151

ELLSWORTH WOOD, as Executor of the Estate
of Elaine Shipp, Deceased,

Plaintiff,

vs.

EVERETT S. SHIPP, EVERETT A. SHIPP,
ROBERT L. SHIPP, METROPOLITAN
FINANCE CORPORATION, a Corporation;
METROPOLITAN FINANCE CORPORA-
TION OF CALIFORNIA, a Corporation;
CHESLEY FINANCE CORPORATION, a
CORPORATION; SUMMIT REALTY COR-

PORATION, a Corporation; INVESTORS
REALTY CORPORATION, a Corporation,
Defendants.

JUDGMENT

The above-entitled matter came on regularly for trial before the Hon. Ingall W. Bull, Judge Presiding, in Department 32 of the above-entitled Court, sitting without a jury, on April 20, 1949, and continued on April 21, 22, 25, 26, 27, 29, May 2, 3, 4 and 5, 1949, plaintiff being represented by Messrs. Waters, Arditto & Waters, by James J. Arditto, Esq., and the defendants Everett S. Shipp, Everett A. Shipp, Robert L. Shipp, Summit Realty Corporation, a Corporation, and Investors Realty Corporation, a Corporation, being represented by J. Edward Haley, Esq., and the defendants, Metropolitan Finance Corporation, a Corporation; Metropolitan Finance Corporation of California, a Corporation, and Chesley Finance Corporation, a Corporation, being represented by Messrs. Macfarlane, Schaefer & Haun, Henry Schaefer, Jr., Esq., appearing, and both oral and documentary evidence having been submitted, and said cause having been argued in briefs and submitted, and the Court having made its Findings of Fact and Conclusions of Law, now renders judgment as follows:

It Is Hereby Ordered, Adjudged and Decreed that the Defendant's Metropolitan Finance Corporation of California, plea in abatement as set forth in its affirmative defense in its Answer be granted;

It Is Further Ordered, Adjudged and Decreed that the plaintiff take nothing as against Everett A.

Shipp, Robert L. Shipp, Metropolitan Finance Corporation, a corporation; Metropolitan Finance Corporation of California, a corporation; Chesley Finance Corporation, a corporation; Summit Realty Corporation, a corporation; and Investors Realty Corporation, a corporation, and that said defendants recover their costs in the amount of \$17.00 claimed by defendants Metropolitan Finance Corporation, Metropolitan Finance Corporation of California and Chesley Finance Corporation.

It Is Further Ordered, Adjudged and Decreed that the plaintiff recover judgment against the defendant, Everett S. Shipp, for an undivided one-half interest of the following furniture and household effects:

1. Rug purchased from Bullock's for \$1,633.58;
2. 10' x 12'11" Chinese rug purchased from Barkers for \$835.38;
3. A table, chairs, service cart and ottoman purchased from Bullock's for \$486.16.

It Is Further Ordered, Adjudged and Decreed that the defendant Everett S. Shipp recover his costs in the amount of \$.....

It Is Further Ordered, Adjudged and Decreed that the defendant Everett S. Shipp turn over possession of the separate property of Elaine Shipp that remains in his possession, to wit:

Complete bedroom set including large rug; bric a brac, bed, mattress, springs, table, chest of drawers, dressing table, occasional chair, lamp table, mirror and chaise lounge.

Dated: March 9th, 1950.

INGALL W. BULL,
Judge.

EXHIBIT 4

Wood v. Shipp
Cite as 233 P. 2d 193
Civ. 18015

District Court of Appeal, Second District,
Division 1, California
July 10, 1951

Ellsworth Wood, as executor of the estate of Elaine Shipp, sued Everett S. Shipp and others for declaratory relief and an accounting as to community property. The Superior Court, Los Angeles County, Ingall W. Bull, J., rendered judgment in favor of defendants, except with reference to certain household effects, and plaintiff appealed. The District Court of Appeals, Doran, J., held that the evidence sustained the trial court's findings to the effect that the furniture and household effects acquired during the marriage constituted the only community property in which the wife's estate would have any interest.

Affirmed.

1. Pleading [Key] 236(3)

Trial court is possessed of broad discretionary power in reference to allowance or disallowance of amendments to pleadings during course of trial.

2. Evidence [Key] 546

In deceased wife's executor's suit for declaratory

relief and accounting as to community property, there was no prejudicial error in trial court's exclusion of hypothetical testimony of alleged expert witnesses as to "reasonable value" of husband's services as corporate officer, in absence of abuse of discretion of trial court in concluding, after voir dire examination, that witness was not qualified.

3. Appeal and error [Key] 1056(1)

In deceased wife's executor's action for declaratory relief and accounting as to community property, where complaint contained no allegation of fraud or scheme by which husband had deliberately planned to reduce community property and trial court was not called upon to determine whether salaries received prior to marriage compared favorably or unfavorably with those received thereafter, there was no prejudicial error in exclusion of testimony as to amount of salary received by husband during eight years preceeding marriage.

4. Appeal and error [Key] 1056(1)

In deceased wife's executor's action for declaratory relief and accounting as to community property, trial court did not commit prejudicial or reversible error in refusing to admit in evidence a piece of paper on which husband had written certain figures, where such evidence was offered as bearing upon matter of reasonable salary of husband and with reference to a "disregard of corporate entity," in view of the indefinite nature of the so-called "doodlings" contained on the paper and in view of the entire state of the record.

5. Appeal and error [Key] 931(1), 933

The reviewing court is without power to substitute its deductions for those of trial court, and every favorable inference which may fairly be deduced from evidence should be resolved in favor of prevailing party and evidence favoring prevailing party must be accepted as true by appellate tribunal and contradictory evidence must be disregarded.

6. Husband and wife [Key] 264

In deceased wife's executor's action for declaratory relief and accounting as to community property evidence sustained trial court's finding to effect that furniture and household effects acquired during marriage constituted only community property in which wife's estate would have any interest.

Waters, Arditto & Waters, by James J. Arditto, Los Angeles, for appellant.

J. Edward Haley, and MacFarlane, Schaefer & Haun, by Henry Schaefer, Jr., and E. J. Caldecott, all of Los Angeles, for respondents.

Doran, Justice.

The complaint herein alleges that Elaine Shipp who died testate on July 27, 1948, was married to the respondent Everett S. Shipp at Las Vegas, Nevada, on April 11, 1940; that no children were born of said marriage; that the parties had accumulated certain community property consisting of stocks, bank accounts, etc., the nature and extent of which the court is asked to determine. The de-

cedent's will specifies certain alleged community property, and after specific bequests leaves the residue to Ellsworth Wood, decedent's brother, also named as executor. Answers filed by Everett S. Shipp, the husband, and by various corporations deny that decedent possessed any community interest in corporate stocks, etc., described therein, and aver that such items are the separate property of Mr. Shipp. The trial court found in favor of the respondents except in reference to certain household effects.

The record discloses that Everett S. Shipp, aged 47 years at the time of the marriage, had resided in Los Angeles since 1916, and for many years prior to said marriage had possessed valuable stock interests in several corporations, namely, Metropolitan Finance Corporation, Metropolitan Finance Corporation of California, and Chesley Finance Corporations. These interests were estimated as being worth a sum in excess of \$250,000. Other corporations such as Investors Realty Corporation and Summit Realty Corporation were organized by Shipp after the marriage to decedent; there was evidence, controverted by appellant, to the effect that shares in these corporations were purchased with Shipp's separate funds. In some instances, as shown in a report prepared by Accountant Wright, respondent's stock holding had increased since the marriage.

On March 1, 1948, Everett S. Shipp commenced a divorce action against Elaine Shipp; the wife filed a cross-complaint for separate maintenance asking

for an accounting and division of community funds. While this divorce action was pending, Elaine Shipp died. The present action for declaratory relief, accounting as to community property, etc., was filed by Elaine Shipp's executor, and names as defendants the various corporations hereinbefore mentioned, the husband Everett S. Shipp, and two sons by a previous marriage to whom the husband, on March 8, 1948, had transferred 1,200 shares of stock in Summit Realty Corporation.

Specifically, the present action seeks an accounting of alleged community funds which it is said the respondent husband improperly expended: "(1) \$10,689.95 expended on the Fuller Street house * * *; (2) Community funds expended for State and Federal taxes on allegedly separate income of Everett S. Shipp * * *; (3) \$2,710.14 paid * * * out of community funds as interest and principal payments on allegedly separate property obligations * * *; (4) \$8,819.56 in gifts by Everett S. Shipp to members of his family through prior marriages * * *; (5) \$30,258.99 expended under the Pagel Property Settlement Agreement (with a former wife of Everett S. Shipp)."

At the trial, appellant's motion to amend the complaint to conform to proof in reference to stock in three corporations alleged to be community property, and to cover an accounting of community funds alleged to have been expended for non-community purposes, was denied. Following the trial the matter was submitted to the trial judge on exhaustive written briefs. As hereinbefore indicated,

all issues were decided against the appellant except in reference to certain furniture and household effects acquired after the marriage.

[1] Appellant's first contention, that the trial court erred in denying the motion to amend the complaint to conform to the proof, presents no cause for reversal. As mentioned in respondents' brief, and conceded by the appellant, the trial court is possessed of broad discretionary power in reference to the allowance or disallowance of amendments to pleadings during the course of a trial. No abuse of that discretionary power has been pointed out in the instant case.

[2] The same may be said in respect to appellant's argument that the trial judge committed prejudicial error in excluding hypothetical testimony of appellant's alleged expert witness as to "reasonable value" of the husband's services as a corporate officer. After voir dire examination the trial court concluded that the witness was not qualified. Since this matter, like that of amendment, was one involving the trial court's discretion, and no abuse of discretion appears, appellant's contention is untenable.

[3] Alleged error in the exclusion of testimony as to amount of salary received by the husband during the eight years preceding the marriage must be decided against the appellant's contention. As respondents have pointed out, the complaint contains no allegations of fraud or any scheme by which Mr. Shipp deliberately planned to reduce the community property, and the trial court was not called

upon to determine whether the salaries received prior to the marriage compared favorably or unfavorably with those received thereafter. Again it may be said that no prejudicial error has been pointed out.

[4] Complaint is made of the trial court's refusal to admit in evidence a piece of paper upon which Mr. Shipp had written certain figures, offered as bearing upon the matter of "reasonable salary" of the husband, and in re a "disregard of Corporate Entity." Appellant's counsel at the trial referred to this paper as having "a lot of doodlings on it that I think the Court will find interesting." The manner in which appellant had procured the paper appears to be a controversial subject, respondents' theory being that it was "procured from the wastebasket which would seem to indicate that it had been discarded by Mr. Shipp as worthless. There is no evidence that the document was ever issued, put in circulation or used for any purpose other than the making of an analysis of some kind by Mr. Shipp." Regardless of its source, however, the exclusion of such a paper containing so-called "doodlings," cannot, in view of its indefinite nature and the entire state of the record, be deemed prejudicial or reversible error in the instant case.

[5, 6] The appellant's argument on this appeal is largely concerned with the proposition that the trial court's findings to the effect that furniture and household effects acquired during the marriage constitute the only community property in which the wife's estate would have any interest, are not sup-

ported by the evidence. It is appellant's contention that the trial court should have found that a large part of the stock holdings, etc., were community property. The theory advanced, as hereinbefore indicated, is that Mr. Shipp had deliberately diverted community funds into separate property channels for the purpose of defeating the wife's interest therein.

Appellant insists that "a husband cannot, through the simple device of incorporating and manipulating his transactions through alleged corporate forms prevent his spouse from receiving her just and proper community property interest." It is further averred that "whatever was earned during the marriage in question herein, by the five alleged Corporate Respondents, is attributable primarily to the efforts, management, skill and ability of Everett S. Shipp," and that such earnings are therefore community property. Respondents' brief points out, however, that "His method of operation was established long before his marriage and did not change thereafter," and that there is substantial evidence supporting the trial court's findings that the property in question was separate and not community property.

It is at once apparent that appellant seeks to have the reviewing court draw from the evidence other and different conclusions than those found by the trial judge. The usual rule that an appellate court will not attempt to weigh the evidence where the record discloses substantial evidence in support of the trial court's findings is conceded by the appel-

lant. That rule must govern, and in the present case can only result in a decision adverse to appellant's contentions. In the one hundred odd pages of appellant's opening brief are set out various items of evidence from which are drawn conclusions favorable to appellant's position. This partisan survey of the evidence relates not only to corporate stocks acquired and owned by the husband and certain increase in Mr. Shipp's equities during the marriage. It also relates to a residence at 641 Toyopa Drive, Pacific Palisades, held in the name of the Metropolitan Finance Corporation of California, and to proceeds of the sale of what is known as the "Fuller Street Home," both of which items are claimed as community property. Other items are similarly claimed.

The record discloses that all these matters were gone into exhaustively at the trial. There was, for example, a detailed report by Charles H. Wright, a certified public accountant, dealing with the books and records of the corporate respondents and of Everett S. Shipp. The accountant was called as a witness by the appellant and the accountant's report was used extensively by both parties, each seeking to draw therefrom conclusions favorable to its contentions. Much other evidence, documentary and testimonial, was offered; the matter was finally submitted to the trial judge upon briefs. From the record as a whole, rather than from isolated items as culled by the appellant, the trial court found in favor of the respondents except as to household items. It can hardly be doubted that the trial court

gave due consideration to the various points now raised by appellant.

Considering the accountant's report in connection with all of the other evidence, whether contradicted or uncontradicted, it cannot be said that the trial court's findings are unsupported. Such being the situation, as has been so often reiterated in the California cases, "the reviewing court is without power to substitute its deductions for those of the trial court." In the language of *Church v. Headrick*, 101 Cal. App. 2d 396, 402, 225 P. 2d 558, 562, "Every favorable inference which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. Evidence favoring the prevailing party must be accepted as true by the appellate tribunal and contradictory evidence must be disregarded." No prejudicial error has been made to appear, and appellant's various contentions are untenable.

The judgment is affirmed.

White, P. J., and Drapeau, J., concur.

Filed at hearing January 23, 1953.

The Tax Court of the United States

Docket No. 36769

E. S. SHIPP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

TRANSCRIPT OF PROCEEDINGS

January 23, 1953—10:15 A.M.

(Met pursuant to notice.)

Before: Honorable J. Gregory Bruce, Judge.

Appearances:

DEXTER D. JONES,

Appearing for the Petitioner.

WILLIAM P. FLYNN,

HONORABLE CHARLES W. DAVIS,

Chief Counsel,

Bureau of Internal Revenue,

Appearing for the Respondent.

The Clerk: Docket No. 36769, E. S. Shipp.

Mr. Flynn: William P. Flynn, Jr., for the Respondent.

Mr. Jones: Dexter D. Jones, for Petitioner.

Your Honor, we have entered into complete stipulations of fact. There will be no oral testimony. It is ready to hand in. I understand the Respondent has an exhibit he would like to offer, which we have no objection to.

Mr. Flynn: Respondent would like to offer as its exhibit in this case, the 1949 individual income tax return for E. S. Shipp.

The Court: The stipulation of facts, do you have that?

Mr. Flynn: Yes.

The Court: It will be received and made a part of the record, and Petitioner's exhibits.

The Clerk: Evidently in the stipulation of facts there are four exhibits.

Are there any joint exhibits in there?

Mr. Jones: There are no joint exhibits.

The Clerk: This will be marked as Respondent's Exhibit A.

The Court: Respondent's Exhibit A will be received.

(The document above referred to was received in evidence and marked Respondent's Exhibit A.)

Mr. Flynn: May we have permission to withdraw that exhibit?

The Court: Leave is granted to withdraw the original and substitute photostats.

Mr. Jones: I would like to have time to file briefs on that matter.

The Court: The case will be submitted. Petitioner's brief forty-five days, Respondent's thirty, reply brief thirty days thereafter; briefs seriatim.

The Clerk: Petitioner's brief will be due on March 9, 1953; Respondent's brief due on April 8, 1953; reply brief in the matter will be due on May 8, 1953.

(Whereupon, at 10:20 o'clock a.m., Friday, January 23, 1953, the hearing in the above-entitled matter was closed.)

Filed February 18, 1953. T. C. U. S.

U. S. INDIVIDUAL INCOME TAX RETURN

3202812

1949

For calendar year 1949 or fiscal year beginning 1949, and ending 1950

EMPLOYEES: Instead of this form, you may use Form 1040A if your total income was less than \$5,000, consisting wholly of wages shown on Forms W-2, or of such wages and not more than \$100 of other wages, dividends, and interest.

Do not write in these spaces

Name **E. S. SHIPP**

(PLEASE PRINT. If this is a joint return of husband and wife, use first names of both.)

HOME ADDRESS **15000 LA CUMBINE DRIVE**

(PLEASE PRINT. Street and number or rural route)

PACIFIC PALISADES

(City, town, or post office)

CALIFORNIA

(State)

Social Security No. **550 - 01 - 6507**Occupation **CORPORATION EXECUTIVE**

File

Code

Serial

No.

(Cashier's Stamp)

1. Tell your own name.

If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband).

List names of other close relatives (as defined in instructions) with 1949 incomes of less than \$500 who received more than one-half of their support from you in 1949. If this is a joint return of husband and wife, list dependent relatives of both.

Name (please print)

Check below whether you (or your wife) were at the end of your taxable year—

IN OR OVER

BLIND

On lines a and b below—
Write 1 if neither 65 nor blind,
Write 2 if either 65 or blind,
Write 3 if both 65 and blind.Your name **E. S. SHIPP**

Wife's (or

husband's) name

Yes ☐ No ☒Yes ☐ No ☒a. Number of exemptions for you **1**Yes ☐ No ☐Yes ☐ No ☐

b. Number of her (his) exemptions

Name of Other Dependent Relative

Relationship

Address—If different from yours

Enter here total number of exemptions claimed (yours and your wife's plus one for each dependent listed above) **1**

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1949, BEFORE PAY-ROLL DEDUCTIONS for taxes, social security, bonds, etc. Also enter amount of income tax withheld. Persons claiming traveling or reimbursed expenses, see instructions.

Principal Employer's Name

Where Employed (City and State)

Amount of Income Tax Withheld

Total Wages

SCHEDULE\$ **1,834 80**\$ **15,367 99**Enter totals \$ **1,834 80**\$ **15,367 99**

3. Enter here the total amount of your dividends.

4. Enter here the total amount of your interest (including interest credited on savings accounts; also interest from Government obligations unless wholly exempt from taxation).

5. If you received any other income, give details on page 2 and enter the total here.

6. Add income shown in items 2, 3, 4, and 5, and enter the total here.

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the table on page 4. This table allows about 10 percent of your total income for charitable contributions, interest, taxes, medical expenses, etc. If such deductions exceed 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 2.

IF INCOME WAS \$5,000 OR MORE.—Do not use tax table. Compute tax on page 3. Use standard deduction or itemize deductions, whichever is to your advantage.

HUSBAND AND WIFE.—For split-income benefits, file a joint return. If filing separate returns, and one has itemized deductions, both must itemize.

7. Enter your tax from table on page 4, or from line 18, page 3.

8. How much have you paid on your 1949 income tax?

(A) By tax withheld (in item 2, above). Attach Original Forms W-2.

(B) By payments on 1949 Declaration of Estimated Tax.

\$ **1,834 80**\$ **4,067 60**

Enter total here →

\$ **7,302 82**\$ **5,902 40**\$ **1,400 42**

9. If your tax (item 7) is larger than payments (item 8), enter BALANCE OF TAX DUE here.

This balance of tax due must be paid in full with return.

10. If your payments (item 8) are larger than your tax (item 7), enter the OVERPAYMENT here.

\$

\$

\$

\$

\$

11. A return for a prior year, state latest year **1948**City **LOS ANGELES**County in which you reside **LOS ANGELES**Is your wife (or husband) making a separate return for 1949? **No**

(Yes or No)

Did your wife (or husband) file a separate return for 1949? **No**

(Yes or No)

If "Yes," write her (or his) name

(Date)

(Signature of taxpayer)

(Signature of taxpayer's wife or husband if this is a joint return)

(Date)

(Name of firm or employer, if any)

On any basis of split-income provisions, husband and wife must include all their income, and BOTH MUST SIGN, even though only one has income.

Schedule D.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

(or loss) from sale or exchange of capital assets (from separate Schedule D)

(or loss) from sale or exchange of property other than capital assets (from separate Schedule D)

Schedule E.—INCOME FROM PARTNERSHIPS, ESTATES AND TRUSTS, AND OTHER SOURCES

NAME

ADDRESS

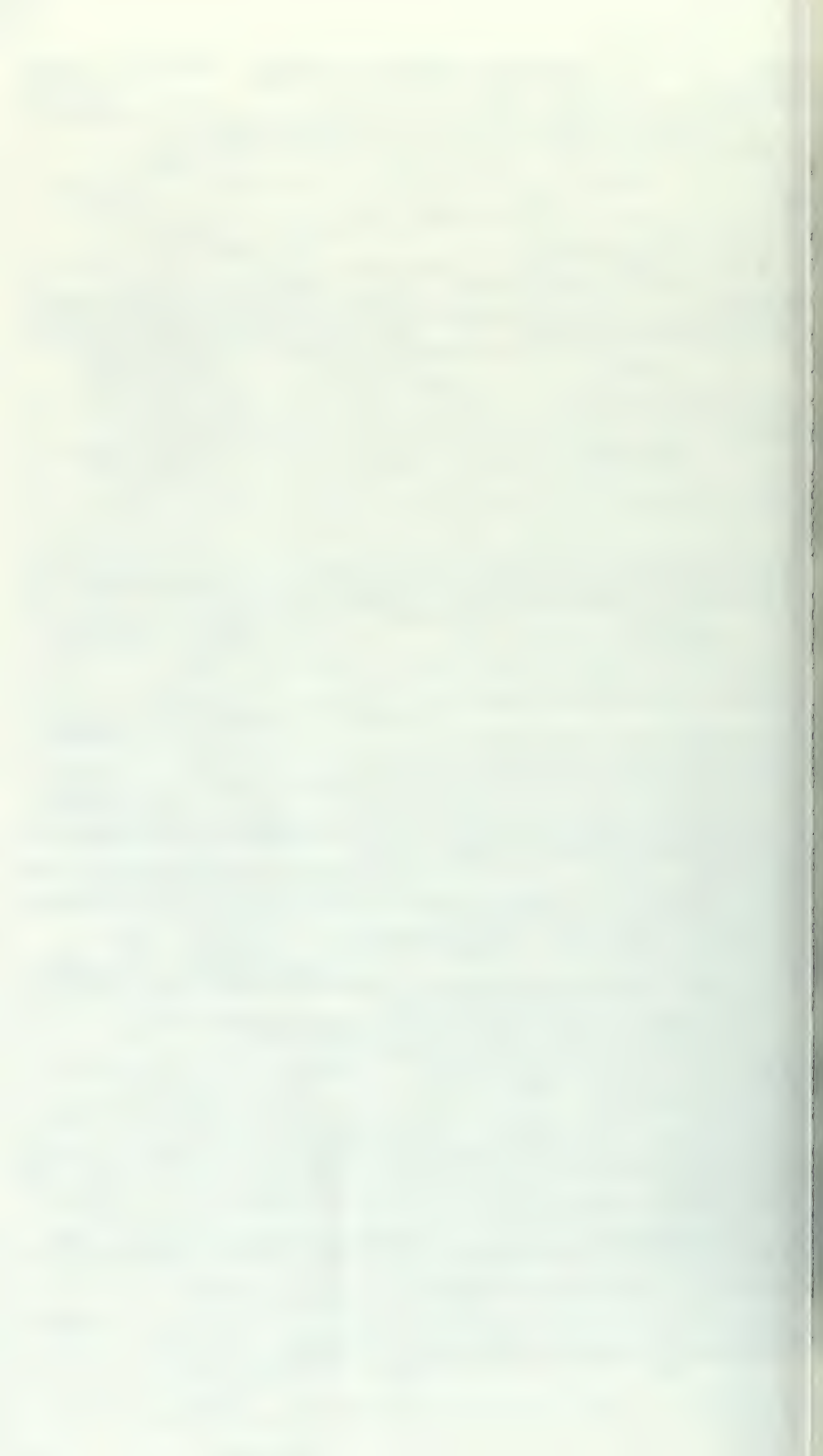
AMOUNT

Enter total here →

Total income (or loss) from above sources (Enter as item 5, page 1)

654 28

645 28



ITEMIZED DEDUCTIONS—FOR PERSONS NOT USING TAX TABLE ON PAGE 4 OR STANDARD DEDUCTION ON LINE 3 BELOW—

If husband and wife (not legally separated) file separate returns and one itemizes deductions, the other must also itemize.

List deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.

	Amount
Contributions	
SCHEDULE	\$
Allowable Contributions (not in excess of 15 percent of item 6, page 1)	\$ 106 00
Interest	
SCHEDULE	\$
Total Interest	\$ 839 62
Taxes	
SCHEDULE	\$
Total Taxes	\$ 718 58
Losses from a, storm, or fire casualty, or theft	
SCHEDULE	\$
Total Allowable Losses (not compensated by insurance or otherwise)	
Medical and dental expenses	
SCHEDULE	\$
Net Expenses (not compensated by insurance or otherwise)	\$
Enter 5 percent of item 6, page 1, and subtract from Net Expenses.	
Allowable Medical and Dental Expenses. See Instructions for limitation.	
Miscellaneous (See instructions)	
SCHEDULE	\$
Total Miscellaneous Deductions	\$ 6,265 26
TOTAL DEDUCTIONS	\$ 7,929 46

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1 Enter amount shown in item 6, page 1. This is your Adjusted Gross Income.	\$ 30,424 80
2 Enter DEDUCTIONS. If deductions are itemized above, enter the total of such deductions. If adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of 10 percent of line 1, above, or \$1,000, whichever is the lesser, or \$500 if this is the separate return of a married person.	\$ 7,929 46
3 Subtract line 2 from line 1. Enter the difference here. This is your Net Income.	\$ 22,495 34
4 Multiply \$600 by total number of exemptions claimed in item 1, page 1. Enter total here.	\$ 600 00
5 Subtract line 4 from line 3. Enter difference here.	\$ 21,895 34
6 a, 7, and 8 should be filed by ONLY by a single person or a married person making a separate return.	
9 Enter the tax rates shown in Instructions to figure your tentative tax on amount shown in line 5 (if line 3, above, includes partially tax-exempt interest, see Instructions). Enter the tentative tax here.	\$ 8,321 39
10 Line 6 is (a) not over \$400, enter 17% of amount on line 6.	
(b) over \$400 but not over \$100,000, enter \$68 plus 12% of the excess over \$400.	\$ 1,018 57
(c) over \$100,000, enter \$12,020 plus 9.75% of the excess over \$100,000.	\$ 7,302 82
11 Subtract line 7 from line 6. Enter the difference here. This is your combined normal tax and surtax.	
12 a, b, and c should be filed by ONLY if this is a joint return of husband and wife.	
13 Enter one-half of amount on line 5, above.	\$
14 Enter the tax rates shown in Instructions to figure your tentative tax on amount shown in line 9 (if line 3, above, includes partially tax-exempt interest, see Instructions). Enter the tentative tax here.	\$
15 Line 10 is (a) not over \$400, enter 17% of amount on line 10.	
(b) over \$400 but not over \$100,000, enter \$68 plus 12% of the excess over \$400.	
(c) over \$100,000, enter \$12,020 plus 9.75% of the excess over \$100,000.	\$
16 Subtract line 13 from line 10. Enter the difference here.	\$
17 Multiply amount on line 12 by 2. Enter this tax here. This is your combined normal tax and surtax.	\$
18 Alternative tax computation is made on separate Schedule D, enter here tax from line 12 on back of Schedule D.	\$
19 Use the standard deduction in line 2, disregard lines 15, 16, and 17, and copy on line 18 the same figure you entered on line 4, 13, whichever is applicable.	\$
20 Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116).	\$
21 Enter here any income tax paid at source on tax-free covenant bond interest.	\$
22 Add the figures on lines 15 and 16 and enter the total here.	\$
23 Subtract line 17 from line 8, 13, or 14, whichever is applicable. Enter difference here and in item 7, page 1. This is your tax.	\$

E. S. Shipp
15000 La Cumbre Drive
Pacific Palisades, California
Calendar Year 1949

Salaries, Commissions, Etc.	Income Tax Withheld	Total Received
Metropolitan Finance Corporation of California:		
Salary	\$1,227.60	\$ 9,000.00
Expense allowance—traveling		524.15
Director's fee		70.00
Chesley Finance Corporation:		
Salary	438.00	3,600.00
Investors Realty Corporation:		
Salary	169.20	1,800.00
Metropolitan Finance Corporation:		
Director's fees		10.00
Thomas V. Humphries—General Agent		
Insurance Commissions		1,315.71
Totals	\$1,834.80	\$16,319.86
Expenses Paid:		
California unemployment insurance tax	\$ 30.00	
Entertainment, traveling, parking fees, telephone, etc	750.00	
Insurance Agent's license	4.00	
Refunds and adjustments—insurance commissions	167.87	
Total expenses paid		951.87
Net income from salaries, commissions, etc.		\$15,367.99
Dividends Received:		
Metropolitan Finance Corporation		\$ 5,618.75
Metropolitan Finance Corporation of California		2,409.40
Chesley Finance Corporation		4,551.26
California Bank		250.00
Amerex Holding Corporation		70.00
Total		\$12,899.41

Interest Received:

Metropolitan Finance Corporation of California	\$ 208.57
Investors Realty Corporation	201.50
Jack H. Perle	1,080.26
Collector of Internal Revenue—on income tax refund	12.79
Total	<hr/> \$ 1,503.12 <hr/>

E. S. Shipp
15000 La Cumbre Drive
Pacific Palisades, California
Calendar Year 1949

Capital Gains and Losses:

100 shares Amerex Holding Corp.—

Date Acquired: 11/17/48

Date Sold: 7/13/49

Amount Received: \$3,069.90

Cost: \$2,347.33

Profit	\$ 722.57
Collections on installment sale of real property made 9/27/46. Property acquired 12/21/29. Principal collections in 1949—\$1,719.74. Gross profit rate—34.074% Earned profit 1949	585.98
Total	<hr/> \$ 1,308.55 <hr/>

Contributions:

Shrine Crippled Children's Hospital	\$ 100.00
Shrine charities	6.00
Total	<hr/> \$ 106.00 <hr/>

Interest Paid:

Metropolitan Finance Corporation—on loan	\$ 83.05
Citizens National Trust & Savings Bank—on loans	727.70
Collector of Internal Revenue—on 1948 extension	28.87
Total	<hr/> \$ 839.62 <hr/>

Taxes:

Los Angeles County—on personal property	\$ 44.76
California and Los Angeles sales tax	108.59
California income tax	565.23
Total	<u>\$ 718.58</u>

Miscellaneous Deductions:

Expenses paid in connection with the conservation of property held for the production of income:

In an Action brought in the Superior Court of the State of California, County of Los Angeles, the spouse of taxpayer claimed a right to participate in the property and assets of taxpayer. The Action asked for an accounting and for the appointment of a Receiver of his property and that of several corporations in which he was a majority stockholder; also for a share of property claimed to be of a community nature, but which was acquired by taxpayer prior to contracting marriage. Taxpayer was successful in his defense of this Action.

Expenses paid in 1949 in defending this Action:

Attorneys fees and expenses	\$1,900.00	
Accounting services	675.00	\$ 2,575.00
Attorney's fee and expenses—re Insurance Commissioner matter		51.56
Attorney's fee and expenses—re Franchise Tax Commissioner matter		352.90
Attorney's services—re income tax returns		75.00
Safe deposit box rental		10.80
Trustee's fee—custodian of stocks		50.00
Alimony paid to Edna Pagel, 623 Camden Drive, Beverly Hills, Calif.		3,150.00
Total		<u>\$ 6,265.26</u>

Schedule D (File with Form 1040)

U. S. TREASURY DEPARTMENT
Internal Revenue Service

SCHEDULE OF GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY

For Calendar Year 1948 or fiscal year beginning 1948, and ending 1950

NAME AND ADDRESS E. S. SHIPP, 15000 LA CUMBRE DRIVE, PACIFIC PALISADES, CALIFORNIA.

(1) CAPITAL ASSETS

1. Kind of property (If necessary, attach statement of descriptive details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Depreciation allowed (or allowable) since ac- quisition or March 1, 1913 (attach schedule)	6. Cost or other basis and cost of subsequent im- provements (If not purchased, attach explanation)	7. Expenses of sale
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS						
			\$	\$	\$	\$
1. Totals			\$	\$	\$	\$
2. Net short-term gain or loss other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 1)						\$
3. Enter your share of the net short-term gain or loss from partnerships and common trust funds						\$
4. Enter here the sum of gains or losses, or difference between gain and loss, shown in lines 2 and 3						\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS

SCHEDULE			\$	\$	\$	\$
5. Totals			\$	\$	\$	\$
6. Net long-term gain or loss other than from partnerships and common trust funds (column 4 plus column 5 minus the sum of columns 6 and 7, of line 5)						\$ 1,308 55
7. Enter the full amount of your share of the net long-term gain or loss from partnerships and common trust funds						\$ 1,308 55
8. Enter here the sum of gains or losses, or difference between gain and loss, shown in lines 6 and 7						\$ 654 28
9. Enter 50 percent of line 8. This is the amount to be taken into account in summary below						\$ 327 14
10. Summary of Capital Gains (use only if gains exceed losses in lines 4 and 9):						\$ 654 28
(a) Net gain for 1949 (either the sum of gains or difference between gains and losses in lines 4 and 9)						\$ 654 28
(b) Capital loss carry-over, 1944-1948 inclusive						\$ 654 28
(c) If line (a) exceeds line (b), enter this excess here and on line 1, Schedule D, page 2, Form 1040						\$
(d) If line (b) exceeds line (a), enter the excess here and use line (c) to determine allowable loss						\$
(e) Enter here and on line 1, Schedule D, page 2, Form 1040, the smallest of the following: (1) the amount on line (d); (2) net income (adjusted gross income if tax table is used) computed without regard to capital gains or losses; or (3) \$1,000						\$
(f) Enter here the amount on line (c) plus any capital loss carry-over from 1944 which was not used against line (a) or in line (e)						\$
(g) Subtract line (f) from line (d) and enter the remainder here. This is your capital loss carry-over to 1950						\$

11. Summary of Capital Losses (use only if losses exceed gains in lines 4 and 9):						\$
(a) Net loss for 1949 (either the sum of losses or difference between losses and gains in lines 4 and 9)						\$
(b) Capital loss carry-over, 1944-1948 inclusive						\$
(c) Total of lines (a) and (b)						\$
(d) Enter here and on line 1, Schedule D, page 2, Form 1040, the smallest of the following: (1) the amount on line (c); (2) net income (adjusted gross income if tax table is used) computed without regard to capital gains or losses; or (3) \$1,000						\$
(e) Enter here the amount on line (d) plus the amount of any 1944 capital loss carry-over not used in line (d)						\$
(f) Subtract line (e) from line (c) and enter the remainder here. This is your capital loss carry-over to 1950						\$

(2) PROPERTY OTHER THAN CAPITAL ASSETS

1. Kind of property	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Depreciation allowed (or allowable) since ac- quisition or March 1, 1913 (attach schedule)	6. Cost or other basis and cost of subsequent im- provements (If not purchased, attach explanation)	7. Expenses of sale
			\$	\$	\$	\$
Totals			\$	\$	\$	\$

Total net gain or loss (columns 4 plus 5 minus the sum of columns 6 and 7). Enter on line 2, Schedule D, page 2, Form 1040.

See other side for instructions and Computation of Alternative Tax

10-10809-1

52 a-7

Form 1099
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
UNITED STATES
INFORMATION RETURN FOR
CALENDAR YEAR 1949

INSTRUCTIONS TO PAYORS

Prepare one of these forms for each payee in accordance with the instructions on return Form 1099. THIS FORM IS NOT REQUIRED WITH RESPECT TO WAGE PAYMENTS REPORTED ON FORM W-2.

Forward with return Form 1099 as to reach the Commissioner of Internal Revenue, in care of Processing Division, C. C. Station, Kansas City 2, Missouri, on or before February 16, 1950.

Copy of this form as filed with the Government should be furnished to the employee whose income is reported in first column to assist him in preparing his income tax return.

TO
WHOM
PAID

Everett S. Shipp
Metropolitan Finance
839 Via Del La Paz
Pacific Palisades, Calif.

1949

KIND AND AMOUNT OF INCOME PAID

Salaries, Fees, Commissions, or Other Compensation, Not Reported on Form W-2	Interest on Notes, Mortgages, Etc.	Rents and Royalties	Annual Income, Dividends, and Other Fixed or Determinable Income	Partners' Income (Share or Share)	Unemployment Compensation
\$	\$	\$	\$	\$	\$
					500.00

BY
WHOM
PAID

California Bank
625 So. Spring St., Los Angeles

(OVER) a-9

Form 1099
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
UNITED STATES
INFORMATION RETURN FOR
CALENDAR YEAR 1949

INSTRUCTIONS TO PAYORS

Prepare one of these forms for each payee in accordance with the instructions on return Form 1099. THIS FORM IS NOT REQUIRED WITH RESPECT TO WAGE PAYMENTS REPORTED ON FORM W-2.

Forward with return Form 1099 as to reach the Commissioner of Internal Revenue, in care of Processing Division, C. C. Station, Kansas City 2, Missouri, on or before February 16, 1950.

Copy of this form as filed with the Government should be furnished to the employee whose income is reported in first column to assist him in preparing his income tax return.

TO
WHOM
PAID

MR. EVERETT S. SHIPP
839 VIA DE LA PAZ
PACIFIC PALISADES, CALIF.

1949

KIND AND AMOUNT OF INCOME PAID

Salaries, Fees, Commissions, or Other Compensation, Not Reported on Form W-2	Interest on Notes, Mortgages, Etc.	Rents and Royalties	Annual Income, Dividends, and Other Fixed or Determinable Income	Partners' Income (Share or Share)	Unemployment Compensation
\$	\$	\$	\$	\$	\$
					165

BY
WHOM
PAID
(Name and address)

Investment Bank
Aetna Insurance Company
670 Main Street
Hartford, Connecticut

(OVER) a-

Form 1099
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
UNITED STATES
INFORMATION RETURN FOR
CALENDAR YEAR 1949

INSTRUCTIONS TO PAYORS

Print on one of these forms for each dividend in accordance with the instructions on return Form 1096. THIS FORM IS NOT REQUIRED WITH RESPECT TO WAGE PAYMENTS REPORTED ON FORM W-2a.

File each with return Form 1096 so as to reach the Commissioner of Internal Revenue, in care of Processing Division, C. C. Station, Building One 2, Missouri, on or before February 15, 1950.

Copy of this form as filed with the Government should be furnished to the employee whose income is reported in first column to assist him in preparing his income tax return.

TO WHOM PAID
Everett S. Shipp
839 Via de la Paz
Pacific Palisades, California

(Print full name and home address (show street, city and state) of owner, if any. If employee is a married woman, name of husband should also be furnished.)

1949

KIND AND AMOUNT OF INCOME PAID

Salaries, Fees, Com- missions, or Other Compensation. Do not include amount reported on Form W-2a	Interest on Notes, Mortgages, Etc.	Rents and Royalties	Dividends, Pensions, Annuities, Alimony, Etc.—Gross Total or Distributable Income	Proceeds from Sale of Bonds (4000 or more)	Dividends (4000 or more) (Gross total, in- clude amount claimed non-taxable)
\$	\$	\$	\$	\$	\$
	1080.36				

BY WHOM PAID
Jack & Martha Perle
176 South Fuller Avenue
Los Angeles 36, California

(Name and address)

REPORTED BY
PHOENIX STATE BANK AND TRUST COMPANY
HARTFORD, CONNECTICUT
2-15-50

Form 1099
INFORMATION RETURN
For calendar year 1949 of dividend
payments of \$100 or more.

Forward with return Form 1096
to the Commissioner of Internal
Revenue, care of Processing
Division, C. C. Station, Kansas
City 2, Missouri, on or before
February 15, 1950.

TO WHOM PAID
(Name and Address)
EVERETT S. SHIPP
839 VIA de la PAZ
PACIFIC PALISADES, CALIFORNIA

DIVIDENDS
\$ 500.00

BY WHOM PAID
Phoenix State Bank and Trust Company
Hartford, Conn.
Dividend Disbursing Agent
for National Fire Insurance Co. of Hartford

Purchased by Investors Realty Corp

2-15-50

Form 1040
U. S. DEPARTMENT OF TREASURY
BUREAU OF INTERNAL REVENUE
UNITED STATES
INFORMATION RETURN FOR
CALENDAR YEAR 1949

INSTRUCTIONS TO PAYERS

Prepare one of these forms for each person to whom you are making payments of interest, dividends, or other income. This form is not required with respect to wage payments reported on Form W-2a.

Forward with return Form 1040 as so to reach the Commissioner of Internal Revenue, in care of Processing Division, G. C. Station, Kansas City 2, Missouri, on or before February 15, 1950.

Copy of this form as filed with the Government should be furnished to the employee whose income is reported in first column to assist him in preparing his income tax return.

TO
WHOM
PAID

Everett S. Shipp
15000 La Cumbre Drive
Pacific Palisades, California

550-0128507

1949

(Print full name and address of person to whom paid, if any. If employee is a

KIND AND AMOUNT OF INCOME PAID

Interest on U.S. Government Bonds or other Government securities (do not include amounts reported on Form W-2a)	Interest on State, Territorial, or Municipal Bonds	Dividends and interest on stocks and bonds	Dividends on foreign stocks and bonds (do not include amounts reported on Form W-2a)	Foreign income (do not include amounts reported on Form W-2a)	Dividends (do not include amounts reported on Form W-2a)
\$	\$	\$	\$	\$	\$
					5,618.75

BY
WHOM
PAID
(Name and address)

METROPOLITAN FINANCE CORPORATION

10-50000-1

839 VIA de la PAZ

PACIFIC PALISADES, CALIF.

(OVER)

Form 1040
U. S. DEPARTMENT OF TREASURY
BUREAU OF INTERNAL REVENUE
UNITED STATES
INFORMATION RETURN FOR
CALENDAR YEAR 1949

INSTRUCTIONS TO PAYERS

Prepare one of these forms for each person to whom you are making payments of interest, dividends, or other income. This form is not required with respect to wage payments reported on Form W-2a.

Forward with return Form 1040 as so to reach the Commissioner of Internal Revenue, in care of Processing Division, G. C. Station, Kansas City 2, Missouri, on or before February 15, 1950.

Copy of this form as filed with the Government should be furnished to the employee whose income is reported in first column to assist him in preparing his income tax return.

TO
WHOM
PAID

E. S. Shipp
15000 La Cumbre Drive
Pacific Palisades, California

550-01-6507

1949

(Print full name and address of person to whom paid, if any. If employee is a

KIND AND AMOUNT OF INCOME PAID

Interest on U.S. Government Bonds or other Government securities (do not include amounts reported on Form W-2a)	Interest on State, Territorial, or Municipal Bonds	Dividends and interest on stocks and bonds	Dividends on foreign stocks and bonds (do not include amounts reported on Form W-2a)	Foreign income (do not include amounts reported on Form W-2a)	Dividends (do not include amounts reported on Form W-2a)
\$	\$	\$	\$	\$	\$
524.15 Traveling Expense	208.57				2,409.40

BY
WHOM
PAID
(Name and address)

METROPOLITAN FINANCE CORPORATION

10-50000-1

OF CALIFORNIA

839 VIA de la PAZ

PACIFIC PALISADES, CALIF.

(OVER)

a-18

[Title of Tax Court and Cause.]

MEMORANDUM OPINION

Murdock, Judge:

The Commissioner determined a deficiency of \$1,451.42 in the petitioner's income tax for 1949. The only issue for decision is whether fees to an attorney and to an accountant in defense of a lawsuit are deductible as ordinary and necessary expenses under section 23(a)(2). The facts have been stipulated and are found as stipulated.

The petitioner filed his individual return for 1949 with the collector of internal revenue for the Sixth District of California.

The petitioner and Elaine Shipp were married on April 11, 1940, and continued as husband and wife until Elaine died on July 27, 1948. Her executor, one month later, filed an action in a California court against the petitioner, his two sons and five corporations in which the petitioner held stock. The principal purpose of the suit was to obtain for Elaine's estate stock in the corporations held by the petitioner, stock in one recently transferred to his sons after Elaine and the petitioner had separated, small amounts of money held by the petitioner in banks and large amounts allegedly due him from the corporations as salary, all of which was claimed by the executor as Elaine's share of the community property of herself and the petitioner. The complaint mentioned some other property which the petitioner, in his answer, admitted he had given to Elaine or which he denied owning. He admitted that

he owned stock in the corporations and money in banks but denied it was community property and alleged it was his separate property. He denied that any money was due him from the corporations. The Court decided, in accordance with the answer filed by the petitioner, that the stock and bank deposits held by the petitioner was his separate property and that none claimed by the executor was community property.

The petitioner employed an attorney and an accountant to assist him in his defense against the claims of Elaine's executor and paid them \$2,575 in 1949. He deducted that amount on his 1949 return as expenses in connection with the management, conservation or maintenance of property held for the production of income. The Commissioner disallowed the deduction.

Legal and accounting fees paid in defending title to property are capital expenditures and are not deductible as ordinary and necessary expenses under section 23(a)(1) or (2). *Garret vs. Crenshaw*, 196 F. 2d 185; *Roberts vs. United States*, 87 F. Supp. 935, certiorari denied 339 U. S. 937; *Safety Tube Corporation*, 8 T. C. 757, affd. 168 F. 2d 787; *James C. Coughlin*, 3 T. C. 420; *Bowers vs. Lumpkin*, 140 F. 2d 927, certiorari denied 322 U. S. 755; *Morgan Jones Estate*, 43 B. T. A. 691, affd. 127 F. 2d 231; *Murphy Oil Co.*, 15 B. T. A. 1195, 1201, affd. on this point 55 F. 2d 17, 26, affd. on other issues 287 U. S. 299; *Phoenix Development Co.*, 13 B. T. A. 414; *West End Consolidated Mining Co.*, 3 B. T. A. 128, 130; *Consolidated Mutual Oil Co.*, 2 B. T. A. 1067.

There is here no question of allocation of the fees. Cf. *Midco Oil Co.*, 20 T. C. . . . , (June 10, 1953). The primary purpose of the suit was to obtain title to property claimed by the petitioner as his separate property and the expenditures in question were for the purpose of defending that title.

Decision will be entered for the respondent.

Entered: June 15, 1953.

Received June 5, 1953.

Served June 17, 1953.

The Tax Court of the United States
Washington
Docket No. 36769

E. S. SHIPP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion, entered June 15, 1953, it is

Ordered and Decided: That there is a deficiency in income tax of \$1,451.42 for the year 1949.

[Seal] /s/ J. E. MURDOCK,
Judge.

Entered June 19, 1953.

Served June 19, 1953.

United States Court of Appeals
for the Ninth Circuit
Docket No. 36769

E. S. SHIPP,

Appellant,

against

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES

E. S. Shipp, the Appellant in this case (petitioner below), by Dexter D. Jones, Raymond V. Haun, Henry Schaefer, Jr., and E. J. Caldecott, his attorneys, hereby files this Petition for Review by the United States Court of Appeals for the Ninth Circuit, of a decision of the Tax Court of the United States, entered on June 19, 1953.

I.

Statement of the Nature of the Controversy

The question presented is whether fees of attorneys and accountant in defense of a law suit are deductible as ordinary and necessary expenses paid or incurred for the management, conservation or maintenance of property held for the production of income, under Section 23 (a) (2) Internal Revenue Code.

A brief statement of the facts is that Appellant and Elaine Shipp were married on April 11, 1940,

and that said marriage was terminated by the death of said Elaine Shipp on July 27, 1948.

On August 27, 1948, Ellsworth Wood, as executor of the estate of Elaine Shipp, deceased, filed an action against Appellant, his two sons and five corporations in which appellant held stock. The action was for declaratory relief, to quiet title and for a receiver to take charge of and administer the properties and assets of appellant and other dependents.

The complaint alleged that shares of stock in the five corporations, small bank deposits, and an increase in equity of the five corporations amounting to \$250,000 was community property of appellant and said Elaine Shipp. Appellant, in the said law suit, denied that the property was community property, and the Court decided in accordance with the answer of appellant. The decision was affirmed on appeal.

Appellant in the defense of said law suit incurred attorney and accountant's fees in the sum of \$2,575.00 and deducted said expenses in his 1949 income tax return as expenses in connection with the management, conservation or maintenance of property held for the production of income, under Section 23(a)(2) Internal Revenue Code. The Commissioner of Internal Revenue denied the deduction and assessed a deficiency in the amount of \$1,451.42.

After issues were joined by Appellant and Appellee before the Tax Court of the United States, a hearing was had in Los Angeles, California. Thereafter, the Tax Court of the United States decided in favor of Appellee, which decision was entered on June 19, 1953.

II.

Jurisdiction

The Appellant, E. S. Shipp, is an individual, with resident at 15040 Altata Drive, Pacific Palisades, California.

The Appellant filed his income tax return for the year in question, namely, the taxable year 1949, with the Collector of Internal Revenue, Sixth District, Los Angeles, California, which office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit where this review is sought.

This Petition for Review is brought pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code (26 U. S. C. A. Sections 1141 and 1142).

Wherefore, your petitioner prays that the United States Court of Appeals for the Ninth Circuit review the decision of the Tax Court of the United States entered on June 19, 1953, and reverse the determinations there made, and for such other and further relief as may seem meet and proper in the premises.

DEXTER D. JONES,

RAYMOND V. HAUN,

HENRY SCHAEFER, JR.,

E. J. CALDECOTT,

By /s/ DEXTER D. JONES,

Attorneys for Petitioner.

State of California,
County of Los Angeles—ss.

E. S. Shipp, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition, and is familiar with the statements contained therein, and that the facts set forth therein are true to the best of his knowledge and belief, and that the said petition is filed in good faith.

/s/ E. S. SHIPP,

Subscribed and sworn to before me this 18th day of August, 1953.

[Seal] /s/ WILLIAM GAMBLE,
Notary Public in and for the County of Los Angeles, State of California.

Received and Filed August 24, 1953, T.C.U.S.

[Title of Court of Appeals and Cause.]

NOTICE OF APPEAL

To: Kenneth W. Gemmill, Esq., Acting Chief Counsel, Bureau of Internal Revenue, Washington, D. C.;
B. H. Neblett, District Counsel;
Earl C. Crouter, Appellate Counsel;
John P. Downes, John J. Burke, Special Attorney.

Please Take Notice that on the 24th day of August, 1953, the undersigned presented to the Tax Court of the United States, and filed with the Clerk thereof the Petition of E. S. Shipp, a copy of which

is annexed hereto, for review by the United States Court of Appeals for the Ninth Circuit, of the final order and decision of the Tax Court of the United States in the above-entitled proceeding, entered upon the records of said Court on June 19, 1953.

Dated: Los Angeles, California, August 25, 1953.

DEXTER D. JONES,

RAYMOND V. HAUN,

HENRY SCHAEFER, JR.,

E. J. CALDECOTT,

By /s/ DEXTER D. JONES,

Attorneys for Petitioner.

Service of copy acknowledged.

Received and Filed September 2, 1953.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 20, inclusive, constitute and are all of the original papers and proceedings, including all original exhibits (1 thru 4), attached to the stipulation of facts, and Respondent's exhibit (A), admitted in evidence, on file in my office as the original and complete record in the proceeding before the Tax Court of the United States entitled: "E. S. Shipp, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 36769" and

in which the petitioner in the Tax Court has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 28th day of September, 1953.

[Seal] /s/ VICTOR S. MERSCH,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 14059. United States Court of Appeals for the Ninth Circuit. E. S. Shipp, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed October 1, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON REVIEW

Comes now E. S. Shipp, petitioner on review in the above-entitled cause, by and through his attorneys, Dexter D. Jones, Raymond V. Haun, Henry Schaefer, Jr., and E. J. Caldecott, and hereby states that he intends to rely upon the following points in this proceeding:

The Tax Court of the United States erred:

1. In entering its decision "That there is a deficiency in income tax of \$1,451.42 for the year 1949."

2. In failing and refusing to sustain the petitioner's freedom from tax liability.

3. In holding and deciding that the primary purpose of the lawsuit in which petitioner was involved was to obtain title to property.

4. In holding and deciding that the expenditures for legal and accounting fees were for the purpose of defending title to property.

5. In failing and refusing to hold and decide that petitioner be allowed to deduct the sum of \$2,575.00 paid to attorneys on account on his 1949 income tax return as ordinary and necessary expenses, incurred in connection with the management, conservation or maintenance of property held for the production of income.

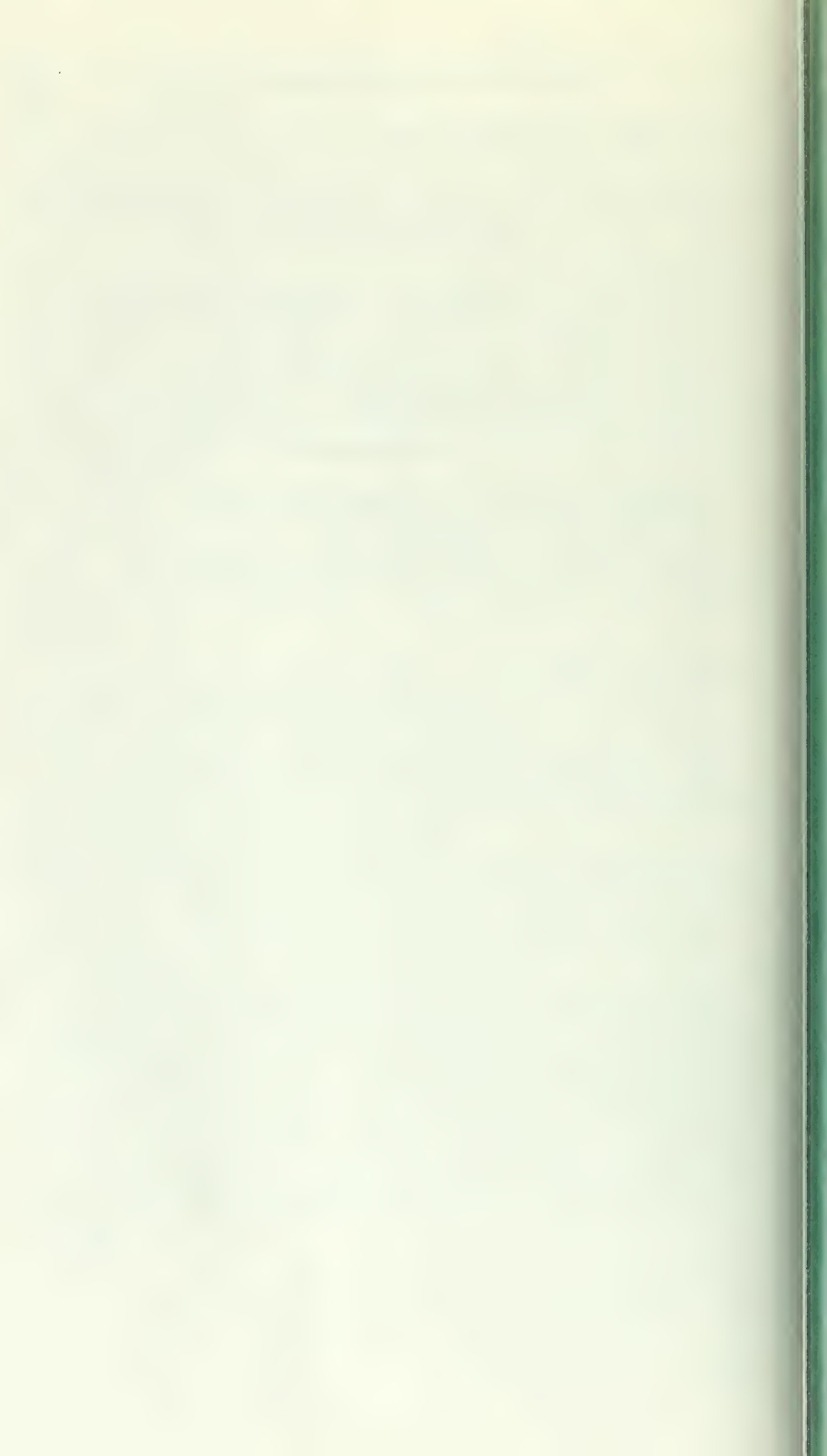
Dated: October 6, 1953.

DEXTER D. JONES,
RAYMOND V. HAUN,
HENRY SCHAEFER, JR.,
E. J. CALDECOTT,

By /s/ DEXTER D. JONES,
Attorneys for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed October 7, 1953.



No. 14059.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. S. SHIPP,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

BRIEF OF APPELLANT.

FILED

DEC 11 1932

PAUL M. O'BRIEN
CLERK

DEXTER D. JONES,
RAYMOND V. HAUN,
HENRY SCHAEFER, JR.,
E. J. CALDECOTT,
417 South Hill Street,
Los Angeles 13, California,
Attorneys for Appellant

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No. 14059.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

E. S. SHIPP,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

BRIEF OF APPELLANT.

Jurisdiction.

This case involves a deficiency in income tax in the amount of \$1,451.42 assessed against the Appellant by the Appellee on his individual income tax return [R. 59-68], for the calendar year 1949 in the Appellee's Notice of Deficiency LA:IT:90D:CTF, dated August 13, 1951 [R. 9, 10].

That within ninety days after the Notice of Deficiency, to wit, September 17, 1951, the Appellant filed his petition for a redetermination of the deficiency with the Tax Court of the United States [R. 4-10]. Appellee's Answer [R. 11-12] was filed with the Tax Court of the United States on October 30, 1951, and the hearing of the matter was held in Los Angeles before Honorable J. Gregory Bruce, Judge, on January 23, 1953.

The jurisdiction of the Tax Court of the United States was invoked under Section 1101, Internal Revenue Code, and Section 272(a)(1), Internal Revenue Code. This Court has jurisdiction to redetermine income tax deficiencies assessed by the Appellee.

The decision of the Tax Court of the United States was rendered June 15, 1953 [R. 71], wherein it was ordered and decided that there is a deficiency in income tax of \$1,451.42 for the year 1949. That within three months from the rendering of the decision by the Tax Court of the United States, to-wit, August 24, 1953, Appellant filed and served Petition for Review of decision in this Court [R. 72-75], and served Notice of Appeal on Appellee September 2, 1953 [R. 75-76].

The Appellant, E. S. Shipp, is an individual, with residence at 15040 Altata Drive, Pacific Palisades, California.

The Appellant filed his income tax return for the year in question, namely, the taxable year 1949, with the Collector of Internal Revenue, Sixth District, Los Angeles, California, which office is located within the jurisdiction of this Court. This Court has jurisdiction to review the decision of the Tax Court of the United States pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code (26 U. S. C. A., Secs. 1141 and 1142).

Statutes and Authorities Involved.

The statutes and other authorities involved are set forth in the Appendix.

Statement.

This case was tried to the Court on the pleadings and a written stipulation of the facts and documentary evidence submitted by the parties [R. 57-58]. There was no oral evidence submitted.

The question presented is whether fees of attorney and accountant in defense of a law suit are deductible as ordinary and necessary expenses paid or incurred for the management, conservation or maintenance of property held for the production of income, under Section 23(a) (2), Internal Revenue Code (Appx., *infra*).

The basic facts as found by the Court [R. 69] may be summarized as follows:

Appellant and Elaine Shipp were married on or about April 11, 1940, and that said marriage was terminated by the death of said Elaine Shipp on July 27, 1948 [R. 13].

On August 27, 1948, Ellsworth Wood, as Executor of the Estate of Elaine Shipp, deceased, plaintiff, filed an action in the Superior Court of the State of California, in and for the County of Los Angeles against Appellant, his two sons and five corporations in which Appellant held stock [R. 13]. The complaint in said action was for declaratory relief, to quiet title, and seeking the appointment of a Receiver to take charge of and administer the properties and assets of Appellant and other defendants [R. 13; Ex. 1, R. 20-33]. The complaint alleged that shares of stock in the five corporations, bank deposits,

household furnishings, \$100,000.00 unpaid salary [R. 26] and an increase in equity in the five corporations of \$250,000.00 was community property of Appellant and said Elaine Shipp [R. 14-15]. The Appellant in his answer [Ex. 2, R. 34-44] admitted that household furniture belonged to the estate but denied that the other property was community property. A Cadillac automobile and the lot and house at 641 Toyopa Drive, Pacific Palisades, California, were in the name of the Metropolitan Finance Corporation [R. 16].

The trial court decided the issues of the case in accordance with the answer of Appellant [Ex. 4, R. 45-46], and a subsequent appeal to the District Court of Appeal was affirmed [Ex. 4, R. 47-56].

Appellant in the defense of said law suit incurred attorney fees in the sum of \$1,900.00 paid to J. Edward Haley, and the sum of \$675.00 paid to Charles Hugh Wright, a certified public accountant, or a total of \$2,575.00 [R. 18], and deducted said sum as a miscellaneous deduction on his 1949 income tax return [Ex. A, R. 63] as expenses in connection with the management, conservation or maintenance of property held for the production of income under Section 23(a)(2), Internal Revenue Code [R. 19]. The Commissioner of Internal Revenue denied the deduction and assessed a deficiency in the amount of \$1,451.42 [R. 9].

After issues were joined by Appellant and Appellee before the Tax Court of the United States, a hearing was had in Los Angeles, California, on January 23, 1953.

Thereafter the Tax Court of the United States in its Memorandum Opinion [R. 69-71] made its findings in accordance with the facts as stipulated, and held *inter alia* that the primary purpose of the suit was to obtain title to property claimed by the Appellant as his separate property and the expenditures in question were for the purpose of defending that title [R. 71]. The Tax Court entered its decision on June 19, 1953, that there is a deficiency in income tax of \$1,451.42 for the year 1949 [R. 71].

Statement of Points to Be Urged.

1. The Tax Court erred in entering its decision "that there is a deficiency in income tax of \$1,451.42 for the year 1949."

2. The Tax Court erred in failing and refusing to sustain the petitioner's freedom from tax liability.

3. The Tax Court erred in holding and deciding that the primary purpose of the law suit in which Appellant was involved was to obtain title to property.

4. The Tax Court erred in holding and deciding that the expenditures for legal and accounting fees were for the purpose of defending title to property.

5. The Tax Court erred in failing and refusing to hold and decide that petitioner be allowed to deduct the sum of \$2,575.00 paid to attorney and his accountant on his 1949 income tax return as ordinary and necessary expenses, incurred in connection with the management, conservation or maintenance of property held for the production of income.

Summary of Argument.

The Appellant in defending the law suit brought by the executor of the estate of his deceased wife, incurred expenses for an attorney and accountant for the management, conservation or maintenance of property held for the production of income.

The law suit brought by the executor was for declaratory relief and accounting to determine community property interests and the extent that the estate would have in Appellant's income producing property. The Tax Court erred in holding and determining that the primary purpose of this law suit was to obtain title to property claimed by the petitioner as his separate property, and that the expenditures in question were for the purpose of defending that title. The law applying to the facts of the case, does not uphold this contention.

The primary purpose of the suit was for an accounting as to community property, and Appellant's interest in defending the action was to conserve and maintain his property as well as the management of the corporations in which he held positions as President and Director. The title to the property was in Appellant and what title was involved in the action was only incidental to the primary purpose of the law suit.

ARGUMENT.

I.

The Action Brought by the Executor of the Estate of Elaine Shipp Against Appellant Was Not Primarily One for Title to Property as That Term Is Used in the Regulations and as Has Been Passed Upon by the Courts.

Section 23(a)(2), Internal Revenue Code (Appx. *infra*) provides that all the ordinary and necessary expenses paid or incurred during the taxable year for the management, conservation or maintenance of property held for the production of income shall be allowed as a deduction.

The regulations 111, Section 29.23(a) 15, and Section 29.24-2 (Appx. *infra*) sets forth various limitations to the deduction under Section 23(a)(2), Internal Revenue Code (Appx. *infra*). The particular limitation in question in this action is that the law suit defended by Appellant was primarily in defense of title.

The facts as stipulated, the exhibits and a preview of the authorities lead to no other conclusion than that the law suit defended by Appellant was not one for title and the Tax Court was in error in so holding. The law suit was one for declaratory relief and accounting as to community property. In general community property in California is that property which is acquired by the efforts, ability or personal qualities of either spouse during their marriage. (5 Cal. Jur., Sec. 7, p. 282.)

The District Court of Appeal determined the type of action in its opinion [Ex. 4, R. 47-56] when it stated as follows [R. 51]:

“The present action for declaratory relief, *accounting as to community property*, etc., was filed by Elaine Shipp’s executor, and names as defendants the various corporations hereinbefore mentioned, the husband Everett S. Shipp, and two sons by a previous marriage to whom the husband, on March 8, 1948, transferred 1,200 shares of stock in Summit Realty Corporation.

“Specifically, the present action seeks an *accounting of alleged community funds* which it is said the respondent husband improperly expended. * * *.”
(Emphasis ours.)

Further on in the opinion [R. 55] the Appellate Court mentions the report by Charles H. Wright, a Certified Public Accountant, dealing with the books and records of the corporate respondents and of Everett S. Shipp, and considered his report along with other evidence. In an action primarily involving title an accountant would not ordinarily be a key witness as in this case.

The law suit in which Appellant was involved is very similar to the facts in the case of *Allen v. Selig* (District Court, April 3, 1952), 104 Fed. Supp. 390, affirmed on Appeal 200 F. 2d 487 in that the widow brought an action against the estate of her deceased husband to obtain a declaration that property in the husband’s name at his death was equally hers. The Commissioner of Internal Revenue contended that the action was to perfect or obtain title to property and that legal fees and incidental expenses incurred were not deductible under Section

23(a)(2), Internal Revenue Code. The District Court held that the action was not a suit to obtain or defend title but was essentially conservatory in its nature, one to conserve income producing property which she already owned. The Circuit Court of Appeals, on page 489 of the opinion, stated as follows:

“We find ourselves in complete agreement with this view. Indeed, we think that to contend otherwise is to wholly misapprehend the facts and their conclusive effect. It is, with gaze and comprehension foreshortened by a too intense concentration upon the shibboleth of a suit to obtain or defend title, to shut one’s eyes to the otherwise obvious difference between the principle which controls this case and that on which the collector relies, with the result that cases are relied on as authorities which are without real bearing here.”

The principle of law involved from the facts in *Allen v. Selig* (*supra*), in Mrs. Selig obtaining property from the estate is no different than Appellant defending his property from the claims of the estate of his deceased wife.

Rassenfoss v. Commissioner (December 18, 1946), 158 F. 2d 764, was an action wherein petitioner defended an action brought by an employee claiming an interest in a partnership. The employee, Campbell, prayed for the following relief (Op. p. 765):

- “a. That a receiver be appointed to take over the partnership business.
- b. That an accounting be had and that the Court should decree that he should receive such amount as such accounting would disclose he had been entitled to.

- c. That a decree be entered determining and adjudicating his right in and to the partnership and its assets.
- d. That the copartnership be dissolved.”

The employee Campbell recovered 1.75 per cent interest in the partnership as against one-third interest claimed by him. Petitioner paid attorney fees which respondent held to be non-deductible on his income tax return, contending that the attorney fees were spent in defense of title and the court in its opinion, on page 767, stated as follows:

“Certainly there can be no room for argument under these authorities, particularly the Kornhauser case, but that the expenses incurred by the petitioner in the instant case were ‘ordinary and necessary expenses’ paid during the taxable year in carrying on his business. Even so, however, the Commissioner contends that such expenditures ‘were more than mere ordinary business expenses’ and that they are not deductible because made in protecting and defending petitioner’s title to the partnership business and property. The Tax Court sustained this view. With all due deference thereto, we reach a contrary conclusion. In the first place, the factual basis for such a contention is more fanciful than real. Laying aside the legal questions as to whether petitioner had any title to the partnership assets, it is perfectly plain, so we think, *that the main and primary purpose of the suit which petitioner defended was for an accounting and any question of title was merely incidental thereto.* This is borne out by the compromise which was finally effected, by which Campbell was awarded almost an infinitesimal and only a limited interest in the partnership.

“In fact, there is less reason for holding that petitioner’s expenditures were in defense of title than were the expenditures by the taxpayer in the Kornhauser case. There, the taxpayer, if he had been unsuccessful in the litigation, would have been required to give up corporate stock in which had been invested the profits of the partnership for which the accounting was sought. In the Potter case, *supra*, it was necessary for the taxpayer to defend the mortgage foreclosure suit in order to protect the corporate stock owned by him. Likewise, in the Leidesdorf case, *supra*, the taxpayer was also defending a suit which involved the ownership of stock in a corporation.” (Emphasis ours.)

The Court’s attention is called to the similarity of the relief prayed for in the *Rassenfoss v. Commissioner* case (*supra*), and the relief asked for in Appellant’s law suit [R. 30-33].

The *Kornhauser* case referred to in the above opinion is cited *Kornhauser v. United States*, 72 L. Ed. 505, 276 U. S. 145 (February 20, 1928), and is a leading case on the deductibility of legal fees in defense of a law suit involving partners wherein the Court held that such fees were deductible.

Another case involving a law suit between partners is a case of *Marsh v. Squires* (D. C. Washington, October 28, 1947), Fed. Supp., 38 A. F. T. R. 1581, wherein the petitioner paid attorney’s fees in defense of the action, and the Commissioner contended that the expenses were in protecting and defending petitioner’s title to the partnership business and property. The Court held for petitioner, and stated on page 1584, as follows:

“So I think the Court is on sound grounds when I conclude that the matter of title to the property was

merely incidental. The primary purpose of the suit was to secure a partnership interest in the accumulation over the years, in this case alleged to have been a hundred thousand dollars. I find it was in keeping with that provision of the law that permits a taxpayer to incur the expense of attorneys' fees in defending a matter that arose directly out of his business, whether it be a partnership business or an individual business, and it can well be classified as an ordinary and necessary expense of a suit such as Watson instituted against the plaintiff in that action. Had Marsh permitted it to go by default, then he, of course, would have lost his entire business he had at the time."

Hochschild v. Commissioner (2d Cir., May 16, 1947), 161 F. 2d 817. Petitioner was stockholder in a subsidiary of the American Metal Company, Ltd., and the plaintiffs in the suit sought (1) to impress a trust upon the Climax stock held by the petitioner; (2) an accounting for damages and profits; and (3) an accounting for the value of any shares of Climax which the petitioner had held but was unable to transfer to The American Metal Company by reason of his sale or other disposition of them. Commissioner contended that the attorney fees in defense of this law suit was expense in defending an equitable title to the petitioner's Climax stock. The Court, on page 819, stated as follows:

"We cannot agree that these fees which the petitioner paid in defense of the lawsuit were any of the less deductible because his liability, if proved, might have destroyed his equitable title to the stock he held. His right to keep it was certainly in issue and in that

sense his title to it was defended, to be sure, but the title as such was not perfected in any way by his expenditures for legal assistance. He thereby but fended off an abortive attack upon the conduct of his business as a fiduciary and by freeing himself from liability to his corporation to account for such conduct put all of his property beyond the reach of his then accusers. A similar result in this respect was attained by the expenditures allowed as a deduction in the Kornhauser case, *supra*."

See also *Levitt & Sons v. Nunan* (2d Cir., May 22, 1944), 142 F. 2d 795, and *Heller v. Commissioner* (9th Cir., January 27, 1945), 147 F. 2d 376.

Although some of the above cases cited involved deduction under Section 23(a)(1) Internal Revenue Code, wherein the Commissioner raised the defense of title theory, it has been held that Section 23(a)(2) is comparable and *in pari materia* with Section 23(a)(1).

Bingham's Trust v. Commissioner, 325 U. S. 365, 89 L. Ed. 1670, where on page 1677 it is stated as follows:

"The effect of Section 23(a)(2) was to provide for a class of non-business deductions coextensive with the business deductions allowed by Section 23(a)(1), except for the fact that, since they were not incurred in connection with a business, the section made it necessary that they be incurred for the production of income or in the management or conservation of property held for the production of income. *McDonald v. Commissioner of Internal Revenue*, *supra* (323 U. S. 61, 62, 66, *ante*, 72, 73, 75, 65 S. Ct. 96, 155 ALR 119); and see H. Rep. No. 2333, 77th Cong. 2d Sess. pp. 46, 74-76; S. Rep. No. 1631, 77th Cong. 2d Sess. pp. 87, 88."

II.

Appellant Is Entitled to Deduct the Expenses Paid to His Attorney and Accountant on His 1949 Income Tax Return as Ordinary and Necessary Expenses Incurred in Connection With the Management, Conservation or Maintenance of Property Held for the Production of Income.

The defense of the law suit by Appellant was in defense of income producing property and to maintain and conserve this property as well as the management. The executor of the estate alleged various items as community property [R. 22-24], all of them not income producing; however defendant in his answer [R. 35] admitted that he gave to his wife household furniture, that the 1947 Cadillac automobile was owned by Metropolitan Finance Corporation of California, one of the defendants, and that the lot and house at 641 Toyopa Drive was owned by the same corporation [R. 16]. The accounting for the ownership of these items was not in issue between Appellant and the executor, but was an issue between other defendants to the action and executor. All the rest of the property in issue between the executor and Appellant was income producing, as herein pointed out, except two small bank accounts in the total amount of \$342.61 [R. 16].

The shares of stock in the various corporations, outstanding loans, and note, made to the corporations were all income producing and were reported on Appellant's 1949 income tax return. [Ex. A, R. 61, 62.] A club membership in the various clubs was held for business purposes and the dues to these clubs were paid by one of the corporations [Ex. 2, R. 39].

The claim of the executor for \$100,000.00 [R. 26] and \$250,000.00 increase in equity in the corporations [R. 27] were both directly connected with the corporations from which he received his income. Of the total income of \$30,424.80 received by petitioner in the year 1949, \$27,993.63 was income from corporations [R. 18]. Thus the law suit had a direct relation to income producing property. *Baer v. Commissioner* (8th Cir.), 196 F. 2d 646.

The Appellant was president and director of four of the corporations for which he received income [R. 15].

The executor of the estate asked for a receiver to be appointed to take over all of the assets in the control of the corporations [R. 32]. This would have seriously affected the management of the corporations from which Appellant received income.

Attorneys' fees in connection with receivership actions have been allowed as deductions as ordinary and necessary expenses. It was so held in the case of *Minerva King Patch* (BTA Mem. Doc. Nos. 98852, 98893, 10181, decided December 13, 1941; 1941 BTA Mem. Dec., Vol. 10, P.-H., Par. 41.552), wherein the court stated as follows.

"As to the \$1,398.54 fee which the partnership paid to the attorney in 1936 the situation is different. The evidence is that this fee was in payment for services which the attorney rendered in opposing a petition filed by the Atwood heirs to have the management of the assets of Richard King and his sisters taken out of their hands and placed in the hands of a receiver. These were the assets that were distributed to the partnership and were under the management of the partnership after the partition of the Henrietta M. King trust estate. *To have had the assets placed in*

receivership would, of course, have seriously interfered with, if not entirely destroyed, the partnership business. We think that the cost of opposing the receivership was directly related to the partnership business and was an ordinary and necessary expense of the business. See Kornhauser v. United States, 276 U. S. 145 (6 AFTR 7358); Welch v. Helvering, 290 U. S. 111 (12 AFTR 1456); Deputy v. Dupont, 308 U. S. 488 (23 AFTR 808)." (Emphasis ours.)

Conclusion.

The case should be remanded for entry of a judgment in favor of Appellant and against Appellee.

Respectfully submitted,

DEXTER D. JONES,
RAYMOND V. HAUN,
HENRY SCHAEFER, JR.,
E. J. CALDECOTT,

By DEXTER D. JONES,

Attorneys for Appellant

Dated: December 17, 1953.

APPENDIX

Internal Revenue Code:

Sec. 23 (Internal Revenue Code). In computing net income there shall be allowed as deductions:

(a) EXPENSES—

(1) TRADE OR BUSINESS EXPENSES.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable years in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity. * * *

* * * * *

(2) NON-TRADE OR NON-BUSINESS EXPENSES.—

In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable years for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

Regulations 111.

Sec. 29.23 (a)-15. Nontrade or nonbusiness expenses.—

(a) In general.—Subject to the qualifications and limitations in chapter 1 and particularly in section 24, an expense may be deducted under section 23(a) (2) only upon the condition that:

(1) it has been paid or incurred by the taxpayer during the taxable year (i) for the production or collection of income which, if and when realized, will be required to be included in income for Federal income tax purposes, or (ii) for the management, conservation, or maintenance of property held for the production of such income; and

(2) it is an ordinary and necessary expense for either or both of the purposes stated in (1) above. * * *

Expenditures incurred in defending or perfecting title to property, in recovering property (other than investment property and amounts of income which, if and when recovered, must be included in income), or in developing or improving property, constitute a part of the cost of the property and are not deductible expenses. Attorneys' fees paid in a suit to quiet title to lands are not deductible; but if the suit is also to collect accrued rents thereon, that portion of such fees is deductible which is properly allocable to the services rendered in collecting such rents. Expenditures incurred in protecting or asserting one's rights to property of a decedent as heir or legatee, or as beneficiary under a testamentary trust, are not deductible expenses. * * *

Sec. 29.24-2. Capital expenditures.—Amounts paid for increasing the capital value or for making good the depreciation (for which a deduction has been made) of property are not deductible from gross income. (See section 23 (1).) Amounts expended for securing a copyright and plates, which remain the property of the person making the payments, are investments of capital. The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. * * *

IN THE
United States Court of Appeals
For the Ninth Circuit

E. S. SHIPP, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for Review of the Decision of the Tax Court
of the United States

BRIEF FOR THE RESPONDENT

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FILED

JAN 22 1954

PAUL P. O'BRIEN
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IN THE
**United States Court of Appeals
For the Ninth Circuit**

No. 14059

E. S. SHIPP, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

**On Petition for Review of the Decision of the Tax Court
of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court (R. 69-71) is not reported.

JURISDICTION

The taxpayer's petition for review (R. 72-75) involves a deficiency of \$1,451.42 in his federal income tax for 1949.¹ On August 13, 1951, the Commissioner of Internal Revenue mailed to taxpayer a notice of such deficiency. (R. 7-10.) Within ninety days thereafter, on September 17, 1951, the taxpayer, pursuant to Section 272 of the Internal Revenue Code, filed a petition with the Tax Court for redetermination of the defici-

¹ Only \$1,326.42 of the total deficiency is in dispute. (R. 5.) In the Commissioner's deficiency determination taxpayer's dividends from the California Bank were increased from \$250 to \$500. This determination was not challenged in the Tax Court and is not now before this Court on appeal. (See R. 9, 19.)

ency. (R. 3, 4-7.) On June 19, 1953, the Tax Court entered a decision sustaining the Commissioner's determination. (R. 71.) On August 18, 1953, the taxpayer filed his petition for review, invoking the jurisdiction of this Court under Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948. (R. 72-75.)

QUESTION PRESENTED

The executor of taxpayer's deceased wife's estate filed a law suit and named taxpayer as one of the defendants. In the law suit the executor claimed that certain property held by the taxpayer was community property and asked the court to, *inter alia* determine and fix title to a one-half interest in the property in the deceased wife's estate. The taxpayer denied the executor's claim and asserted that the property in question was his sole and separate property. Taxpayer, in defending against the executor's claim, incurred and paid fees for the services of an attorney and an accountant. The question is whether the Tax Court correctly concluded that the fees paid to the attorney and accountant were not expenses which could be deducted under Section 23 (a) (2) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*.

STATEMENT

The Tax Court adopted the stipulation of facts filed by the parties as its findings. (R. 69.) The material

facts as given in this stipulation (R. 12-19) are as follows:²

The taxpayer is an individual with residence at 15000 La Cumbre Drive, Pacific Palisades, California, who filed his income tax return for the year 1949 with the Collector for the Sixth District of California, Los Angeles, California. The return was filed upon a cash receipts and disbursements basis. (R. 13)

Taxpayer and Elaine Shipp were married on or about April 11, 1940, and the marriage was terminated by the death of Elaine Shipp on July 27, 1948. (R. 13.)

On the 27th day of August, 1948, Ellsworth Wood, as executor of the Estate of Elaine Shipp, Deceased, Plaintiff, filed an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 549151, against taxpayer, Everett S. Shipp, Everett A. Shipp, Robert L. Shipp, Metropolitan Finance Corporation, a corporation, Metropolitan Finance Corporation of California, a corporation, Chesley Finance Corporation, a corporation, Summit Realty Corporation, a corporation, Investors Realty Corporation, a corporation. (R. 13.)

The complaint in action No. 549151 was for declaratory relief, to quiet title, and seeking the appointment

² Four exhibits were attached to and made a part of the stipulation of facts. These exhibits, consisting of the executor's complaint, the taxpayer's answer, the judgment of the Superior Court for the State of California, and the opinion of the District Court of Appeal, Second District, Division 1, California, are reproduced in the record. (R. 20-56.) For the sake of brevity, the detailed positions of the parties and the determinations of the California state courts, as set forth in these documents, are not included in the above statement of facts.

of a receiver to take charge of and administer the properties and assets of the defendants. In the complaint, among other things, Ellsworth Wood, as executor of the Estate of Elaine Shipp, Deceased, alleged that stock in various corporations was community property, in particular as follows (R. 14):

All of the shares of stock of Investors Realty Corporation and Summit Realty Corporation;
 2,500 shares in Metropolitan Finance Corporation of California;
 1,500 shares in Metropolitan Finance Corporation; and
 1,500 shares in Chesley Finance Corporation;

Bank deposits in the following banks:

California National Bank, Santa Monica;
 Citizens National Trust and Savings Bank of Los Angeles, California;
 Security First National Bank of Los Angeles;
 Bank of America, National Trust and Savings Association;

and other property as follows:

Lot and house at 641 Toyopa Drive, Pacific Palisades, California;
 Furniture and furnishings;
 Insurance and annuity policies;
 Stocks, bonds and monies;
 Note secured by a Deed of Trust on the home and lot situated at 176 South Fuller Street, Los Angeles, California;

Club membership in the following clubs:

Los Angeles Athletic Club;
 Los Angeles Country Club;
 Del Mar Country Club.

The executor also alleged in the complaint that there had been an increase in taxpayer's equity in the several corporations since taxpayer's marriage to Elaine Shipp in the amount of \$250,000, and that this increase constituted community property. (R. 15.)

Taxpayer employed J. Edward Haley, an attorney licensed to practice in all of the courts of the State of California, to represent him in the action filed, and the attorney then filed an answer in behalf of taxpayer. In this answer it was alleged that taxpayer's stock ownership in the various corporations involved was as follows (R. 15-16):

Corporation: Metropolitan Finance Corporation.
 Stock Owned: 84%
 Position Held: President and Director.

Corporation: Metropolitan Finance Corporation
 of California.
 Stock Owned: 16%.
 Position Held: President, General Manager and
 Director.

Corporation: Investors Realty Corporation.
 Stock Owned: 100%.
 Position Held: President and Director.

Corporation: Chesley Finance Corporation.

Stock Owned: 96%.

Position Held: President and Director.

Corporation: Summit Realty Corporation.

Stock Owned: 4%.

Position Held: None.

The taxpayer caused the organization of the five corporations and was an officer and stockholder in these corporations. The dates of organization of the corporations were as follows (R. 16):

<i>Corporation</i>	<i>Organized</i>
Investors Realty Corporation	1945
Summit Realty Corporation	1947
Metropolitan Finance Corporation of California	1940
Metropolitan Finance Corporation	1940
Chesley Finance Corporation	1940

There was a balance on deposit, in Citizens National Trust & Savings Bank, Leimert Park Branch, as of July 27, 1948, in the total sum of \$183.88. The balance on deposit, July 27, 1948, in the California National Bank, Santa Monica Branch, was \$158.73. There was no record of any bank deposits in the Security First National Bank of Los Angeles or the Bank of America, National Trust & Savings Association. (R. 16.)

Title to the lot and house at 641 Toyopa Drive, Pacific Palisades, California, and the Cadillac automobile involved in the action were in the name of the Metropolitan Finance Corporation. (R. 16.)

The other defendants were represented by their respective attorneys as follows (R. 17) :

Investors Realty Corporation by J. Edward Haley, Esq.;

Everett A. Shipp, Robert L. Shipp, and Summit Realty Corporation by J. Edward Haley, Esq.;

Chesley Finance Corporation by Messrs. MacFarlane, Schaefer & Haun;

Metropolitan Finance Corporation of California by Messrs. MacFarlane, Schaefer & Haun;

Metropolitan Finance Corporation by Messrs. MacFarlane, Schaefer & Haun.

Taxpayer was successful in the defense of the action and judgment was entered in taxpayer's favor, except for property that was not in dispute by taxpayer, after the taxable period involved herein to wit, March 9, 1950. (R. 17)

The action was appealed by the executor to the United States District Court of Appeal, Second District, Division 1, California, after the taxable period involved herein. The judgment of the lower court was affirmed. *Wood v. Shipp*, 105 Cal. 2d 335. (R. 17.)

Taxpayer's income tax return for the taxable year 1949, showed gross income in the amount of \$30,424.80. (R. 17.) Of this amount, taxpayer received income from the various corporations as follows (R. 18) :

Metropolitan Finance Corporation of California:

Salary	\$9,000.00
Expense allowance	524.15
Interest on Loan	208.57
Director's fees	70.00
Dividends	2,409.40

Total	\$12,212.12
-------	-------------

Metropolitan Finance Corporation:

Director's fees	\$ 10.00
Dividends	5,618.75

Total	5,628.75
-------	----------

Chesley Finance Corporation:

Salary	\$3,600.00
Dividends	4,551.26

Total	8,151.26
-------	----------

Investors Realty Corporation:

Salary	\$1,800.00
Interest on Loan	201.50

Total	2,001.50
-------	----------

Total income from all corporations	\$27,993.63
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Taxpayer paid to his attorney, J. Edward Haley, during the taxable year 1949, in defense of the action filed by the executor of the estate of Elaine Shipp, the sum of \$1,900, and to Charles Hugh Wright, a certified public accountant, for accounting services rendered in defense of the action, the sum of \$675, or a total amount of \$2,575. (R. 18.)

For the calendar year 1949, taxpayer deducted the sum of \$2,575 as a miscellaneous deduction as expenses paid in connection with the management, conservation or maintenance of property held for the production of income. The Commissioner of Internal Revenue by notice of deficiency dated August 13, 1951, determined a deficiency of \$1,451.42 in taxpayer's income tax liability based in part on a disallowance as a miscellaneous deduction of the amount of \$2,575. (R. 18-19.)

The increase of adjusted net income in the amount of \$250 (dividends from the California Bank) as determined by the Commissioner in his notice of deficiency from which this appeal is taken, is correct, and not contested in this proceeding. (R. 19.)

On the basis of these facts, and after consideration of the briefs submitted by the parties, the Tax Court determined (R. 71), that "The primary purpose of the suit was to obtain title to property claimed by the petitioner as his separate property and the expenditures in question were for the purpose of defending that title." In an earlier part of its opinion (R. 70) the court had pointed out that "Legal and accounting fees paid in defending title to property are capital expenditures and are not deductible as ordinary and necessary expenses under section 23(a) (1) or (2)." Accordingly, the Tax Court (R. 71) held that "Decision will be entered for respondent."

SUMMARY OF ARGUMENT

The Tax Court determined that the expenses in question were incurred and paid for the primary purpose of defending taxpayer's title to certain property. The Tax Court, accordingly, decided that the expenses were capital expenditures and were not deductible under Section 23 (a) (2) of the Code. The Tax Court's decision is correct and its factual determination is fully supported by the record evidence.

The general allegations and the requests in the wherefore clause of the executor's complaint definitely establish that the primary purpose of the law suit was to obtain title to property claimed by the taxpayer to be his separate property. The taxpayer's answer, denying the executor's claim and asserting the property was his sole and separate property with full title vested in him, characterized the taxpayer's defense as title defense and fixed the nature of the expenses attributable to that defense as costs of defending or perfecting title.

Taxpayer's reasons why the Tax Court's factual determination is wrong are without merit. His discussion of the record evidence is superficial and fails entirely to bring to light any facts which controvert the Tax Court's factual analysis. The cases which taxpayer cites and quotes from to show the erroneousness of the Tax Court's analysis are inapplicable and are readily distinguishable from the present case on their facts. In all of the cases he cites, the facts show that defense or perfection of title was only a secondary or incidental purpose for the incurrence of the expenses held to be

deductible. Most of taxpayer's cases have been distinguished by other Courts of Appeals in cases substantially similar to the present case.

Taxpayer's argument that the fees paid to the attorney and accountant bear a direct or proximate relation to the ordinary functions of management, conservation or maintenance of income producing property is not supported either by the facts or the applicable authorities. The facts presented by the taxpayer show only that the services were remotely and indirectly connected with conservation or management of ambiguously designated income producing property. The cases relied upon by the taxpayer in this connection are inapposite. Substantially, the same argument as the taxpayer makes here has been rejected as invalid by other Courts of Appeals in decisions dealing with factual situations containing the same basic elements as are presented by this case.

ARGUMENT

I

The Tax Court Correctly Concluded That the Fees Paid for Services Rendered to Defend Taxpayer's Title to Certain Property Were Capital Expenditures and Were Not Deductible Under Section 23 (a) (2) of the Code

The question presented by this case is whether fees paid to an attorney and an accountant were paid to manage, conserve or maintain property held for the production of income within the meaning of Section 23 (a) (2) of the Internal Revenue Code, Appendix, *infra*.

Section 23 (a) (2) authorizes the deduction of a limited class of "non-business expenses", namely, those in-

curring "for the production or collection of income" or "for the management, conservation, or maintenance of property held for the production of income" provided they are also ordinary and necessary.³

Section 23 (a) (2) was added to the Code by Section 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, for the restricted purpose of affording relief in situations like that presented in *Higgins v. Commissioner*, 312 U.S. 212, wherein it was held that an investor in income-producing securities was not carrying on a "business" and hence was not entitled under Section 23(a)(1) to deduct expenses incurred in managing his investments and collecting the income therefrom. In referring to the legislative background of Section 23(a)(2), it was stated in *McDonald v. Commissioner*, 323 U.S. 57, 61-62:

This amendment was proposed by the Treasury (1 Hearings before Committee on Ways and Means, Revenue Revision, 1942, 77th Cong., 2d Sess., p. 88) to afford relief for a specifically defined inequitable situation which had become manifest by the decision of the Court in *Higgins v. Commissioner*, 312 U.S. 212. In that case this Court held that by previous enactments Congress had made no provision for allowable deductions from profitable transactions not covered by the statutory concept of "business" income. * * * Congress adopted the Treasury proposal for the restricted purpose

³ Here, there is no claim that the expenses were incurred and paid for the production or collection of income.

which originated it. * * * The amendment of 1942 merely enlarged the category of incomes with reference to which expenses were deductible.

It is clear from the House Committee Report which accompanied the Revenue Bill of 1942 that Section 23 (a) (2) was designed to place expenses incurred in producing non-business income on a parity with those incurred in producing business income, since both types of income were subject to the income tax. H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 46, 74-75 (1942-2 Cum. Bull. 372, 410, 429-430); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 87-88 (1942-2 Cum. Bull. 504, 570-571).

In dealing with business expense deductions claimed under Section 23 (a) (1) it has repeatedly been held that to qualify for deduction the expense must be directly connected with or proximately result from the carrying on of the business. *McDonald v. Commissioner, supra*; *Commissioner v. Flowers*, 326 U.S. 465; *Commissioner v. Heininger*, 320 U.S. 467; *Deputy v. duPont*, 308 U.S. 488; *Interstate Transit Lines v. Commissioner*, 319 U.S. 590; *Kornhauser v. United States*, 276 U.S. 145. The same test applies to deductions claimed under Section 23 (a) (2), which is *in pari materia* with Section 23 (a) (1), except that the expense must be directly connected with or proximately result from carrying on activities of producing income, or managing or conserving income-producing property. *Trust of Bingham v. Commissioner*, 325 U.S. 365; *McDonald v. Commissioner, supra*.

It is the "origin and nature of the expense which is determinative of the right to the deduction. *Lykes v. United States*, 343 U.S. 118, 125; *Deputy v. duPont* *supra*; *Interstate Transit Lines v. Commissioner* *supra*.

Here, the facts show that the origin of the claimed expense deduction was the law suit filed by the executor of taxpayer's deceased wife's estate. In the law suit the executor claimed that certain property held by the taxpayer was community property and that, therefore, title to a one-half interest therein was vested in the deceased wife's estate. Taxpayer denied this claim and asserted that the property was his sole and separate property with full title vested in him. This title claim and the denial of the title claim fixed the nature of the proceedings and the expenses attributable thereto as title expenses. The Tax Court so determined (R. 71).

The primary purpose of the suit was to obtain title to property claimed by the petitioner as his separate property and the expenditures in question were for the purpose of defending that title.

It follows from this determination that the expenses were directly connected with and proximately related to the defense of title, not to the management, conservation or maintenance of property held for the production of income. Accordingly, the expenses were capital expenditures and not deductible under Section 22 (a) (2). The Tax Court so decided and we submit its decision is based on a sound factual determination and is correct.

Since the passage of the Revenue Act of 1918, Treasury Regulations ⁴ have consistently provided:

The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense.

By the enactment of the successive Revenue Acts Congress has approved and adopted this uniform departmental construction and given the Regulations the force of law. *Helvering v. Reynolds Co.*, 306 U.S. 110, 115; *Murphy Oil Co. v. Burnet*, 287 U.S. 299, 307.

The provision of the Regulations, has not been altered by the enactment of Section 23 (a) (2) of the Code.

Section 121 merely extended to a new group of taxpayers an allowance of non-trade and non-business expenses theretofore held to be not deductible. See *Trust of Bingham v. Commissioner, supra*, p. 374; *McDonald v. Commissioner, supra*; and *Lykes v. United States, supra*. No new class of allowable deductions was created which would include capital expenditures and no change was made in the law that capital expenditures are not deductible.

⁴ Article 293 of Regulations 45 and 62, promulgated under the Revenue Acts of 1918 and 1921; Article 292 of Regulations 65 and 69, promulgated under the Revenue Acts of 1924 and 1926; Article 282 of Regulations 74 and 77, promulgated under the Revenue Acts of 1928 and 1932; Article 24-2 of Regulations 86, promulgated under the Revenue Act of 1934; Article 24-2 of Regulations 94 and 101, promulgated under the Revenue Acts of 1936 and 1938; Section 19.24-2 of Regulations 103 and Section 29.24-2 of Regulations 111, and Section 39.24(a)-2 of Regulations 118, promulgated under the Internal Revenue Code.

Neither have the Regulations under the Code as amended by the 1942 Act changed the rule as to capital expenditures. Thus Section 29.23(a)-15(b) of Regulations 111 (Appendix, *infra*) provides, in part:

Capital expenditures * * * are not allowable as nontrade or nonbusiness expenses.

* * *

Expenditures incurred in defending or perfecting title to property, in recovering property (other than investment property and amounts of income which, if and when recovered, must be included in income), or in developing or improving property constitute a part of the cost of the property and are not deductible expenses.

The decisions of this Court have recognized these fundamental principles. Thus, in *Heller v. Commissioner*, 2 T.C. 371, affirmed, 147 F. 2d 376 (C.A. 9th), an amount paid to attorneys for services rendered to a stockholder in litigation, under a state statute authorizing a proceeding to require a corporation merging or consolidating to pay the fair market value of their stock to dissenting stockholders, was allowed as a deduction. The Tax Court recognized (p. 373) the rule that amounts paid in defense of title to capital assets are capital expenditures and not deductible, and pointed out (p. 374) that the litigation did not "involve a defense by petitioner of his rights in, and his title to, the stock" but the "right to receive cash for his shares" and "the determination of the amount." Accordingly, it held that the fees paid were for services

rendered in the "production or collection of income." On review this Court stated that the decision of the Tax Court turned upon its findings of fact and held that there was no reversible error.

Again in *Schwabacher v. Commissioner*, 132 F. 2d 516, this Court held that compromise payments and attorneys' fees paid by a partnership in connection with a suit to procure for its benefit the transfer of a membership or seat in the New York Stock Exchange from the estate of a deceased partner, who immediately prior to his death had agreed to transfer his interest in the seat to the partnership nominee, to a new partner constituted a cost of defending or perfecting title to the partnership's equitable property in the seat and hence were not deductible.

Similarly in *Murphy Oil Co. v. Burnet*, 55 F. 2d 17, affirmed, 287 U.S. 299, this Court held that the settlement payment and litigation expense incurred in defense of an adverse title claim against taxpayer's business property constituted capital expenditures and not deductible business expenses.

The Tax Court here applied the well established principle that costs of defending or perfecting title are capital expenditures and not deductible under Section 23 (a) (2). It said (R. 70) :

Legal and accounting fees paid in defending title to property are capital expenditures and are not deductible as ordinary and necessary expenses under section 23(a) (1) or (2). *Garret vs. Crenshaw*, 196 F. 2d 185; *Roberts vs. United States*, 87 F. Supp. 935, certiorari denied 339 U.S. 937;

Safety Tube Corporation, 8 T.C. 757, affd. 168 F. 2d 787; *James C. Coughlin*, 3 T. C. 420; *Bowers vs. Lumpkin*, 140 F. 2d 927, certiorari denied 322 U. S. 755; *Morgan Jones Estate*, 43 B. T. A. 691, affd. 127 F. 2d 231; *Murphy Oil Co.*, 16 B.T.A. 1195, 1201, affd. on this point 55 F. 2d 17, 26, affd. on other issues 287 U. S. 299; *Phoenix Development Co.*, 13 B. T. A. 414; *West End Consolidated Mining Co.*, 3 B. T. A. 128, 130; *Consolidated Mutual Oil Co.*, 2 B. T. A. 1067.

II

Taxpayer's Contentions Are Not Supported by the Record or the Authorities He Cites

Taxpayer does not now challenge the above principle of law. The substance of his position, as we understand it, is that the expenditures here in question were not incurred for the purpose of defending title (Br. 7-13) and that within the meaning of Section 23 (a) (2), they were directly related to the management, conservation and maintenance of income producing property (Br. 14-16).

Taxpayer's claim (Br. 7) is that "The facts as stipulated, the exhibits and a preview of the authorities lead to no other conclusion than that the law suit defended by Appellant was not one for title and the Tax Court was in error in so holding." Neither the record facts, as found in the stipulation and attached exhibits, nor the authorities cited by the taxpayer support his position.

Taxpayer's argument, based on the stipulated facts and exhibits, is superficial and fails entirely to bring

to light any record evidence which controverts the soundness of the Tax Court's analysis of the facts. The Tax Court made the following analysis (R. 69-70):

The principal purpose of the suit was to obtain for Elaine's estate stock in the corporations held by the petitioner, stock in one recently transferred to his sons after Elaine and the petitioner had separated, small amounts of money held by the petitioner in banks and large amounts allegedly due him from the corporations as salary, all of which was claimed by the executor as Elaine's share of the community property of herself and the petitioner. The complaint mentioned some other property which the petitioner, in his answer, admitted he had given to Elaine or which he denied owning. He admitted that he owned stock in the corporations and money in banks but denied it was community property and alleged it was his separate property. He denied that any money was due him from the corporations. The Court decided, in accordance with the answer filed by the petitioner, that the stock and bank deposits held by the petitioner was his separate property and that none claimed by the executor was community property.

An examination of the pleadings in the state court action (Stip. Exs. 1 and 2, R. 20-33, 34-44) and of the opinion of the District Court of Appeal (Stip. Ex. 4, attached to the stipulation, reveals the correctness of the trial court's analysis R. 47-56) and makes evident the fact that it [the analysis] is founded on record evidence.

In the executor's complaint, paragraph VI (R. 22) it was alleged that during the marriage, various items of property were "acquired through the joint efforts of said persons (taxpayer and his deceased wife) and/or with community funds and was and is the community property of the said Elaine Shipp and Everett S. Shipp."

In the answer filed by the taxpayer, after generally and specifically denying the allegation in paragraph VI of the executor's complaint, it was represented (R. 35) that "each and all of the property listed in said paragraph [paragraph VI of the complaint] which is in his [taxpayer's] possession or under his control is now and at all times since he acquired said property has been *his sole and separate property*."⁵ (Emphasis supplied).

Additional evidence that it was taxpayer's title to the property which the executor was challenging is found in the wherefore clause of the executor's complaint. Subsection (a) of that clause asked the court to fix, determine and declare the property to be community property. (R. 30.) Subsection (b) specifically requested that the shares of stock be fixed, determined and declared to be community property of Everett and Elaine Shipp. (R. 30.) Subsection (i) asked (R. 32):

⁵ The executor's claim (R. 23-26) that the deceased wife had a one-half community property interest in unpaid salary and increased equities in the various corporations was answered by the taxpayer (R. 36-40, 41) by denying that there was unpaid salary owing to him and that the equities had increased, or if they had, that the amount of the increase was ascertainable. See Discussion, *infra*.

That the title of the Plaintiff and the Estate of said Elaine Shipp and her heirs, named in Exhibit "A" attached hereto, be quieted by the decree of this Court as against each, every and all of the claims of said defendants, and each of them and that the respective interests of the parties hereto in and to said property be determined and decreed by this Court.

The judgment entered by the Superior Court of California (R. 45-46) and the opinion of the Court of Appeal (R. 49-56) do not spell out with any particularity the nature of the litigation. However, the Court of Appeal in a prefatory factual statement described the contentions of the parties and characterized the action as a contest over title to property. The Court of Appeals said (R. 49-50);

The complaint herein alleges that Elaine Shipp who died testate on July 27, 1948, was married to the respondent Everett S. Shipp at Las Vegas, Nevada, on April 11, 1940; that no children were born of said marriage; that the parties had accumulated certain community property consisting of stocks, bank accounts, etc., *the nature and extent of which the court is asked to determine*. The decedent's will *specifies certain alleged community property*, and after specific bequests leaves the residue to Ellsworth Wood, decedent's brother, also named as executor. *Answers* filed by Everett S. Shipp, the husband, and by various corporations

deny that decedent possessed any community interest in corporate stocks, etc., described therein, and aver that such items are the separate property of Mr. Shipp. The trial court found in favor of the respondents except in reference to certain house hold effects. (Emphasis supplied.)

The authorities relied on by the taxpayer (Br. 8-13) to illustrate by analogy that the expenses here were not paid in defense of title are inapplicable and readily distinguishable on their facts. In each of these cases the controlling facts established that defense or perfection of title was merely an incidental, secondary purpose for incurring the expenses in question. In none of these cases do the facts show, as they do here, that the expenses were directly related to the defense or perfection of title.

In *Allen v. Selig*, 200 F. 2d 487 (C.A. 5th), cited and quoted by taxpayer (Br. 8-9), the trial court in its opinion (104 F. Supp. 390 (N. D. Ga.)) said (p. 392):

The Superior Court action instituted by the Plaintiff did involve the transfer of legal title to her. This, however, was incidental as legal title would have ultimately passed to her by inheritance. Title, even though equitable, was and had been in the Plaintiff. The real purpose of her action was to prevent the laying waste of her property by assessment of wrongful estate taxes and administration expenses against it.

The Court of Appeals accepted and agreed with the factual analysis made by the trial court,⁶ and its affirming decision was predicated on the factual determination that defense or perfection of title was only an incidental, and not a primary purpose of the legislation. Because the expenses were directly connected with the management of the property—in the sense that they were incurred to prevent excessive estate taxes and administration costs from laying waste to the property—they were deductible under Section 23 (a) (2). In the present case there was a factual determination, fully supported by the record evidence, that the expenses were directly connected with the defense of title.

Rassenfoss v. Commissioner, 158 F. 2d 764 (C.A. 7th); *Kornhauser v. Commissioner*, 276 U.S. 145; and *Hochschild v. Commissioner*, 161 F. 2d 817 (C.A. 2d), cited and quoted from by taxpayer (Br. 9-13) have all been distinguished and determined not to be persuasive authority by other Courts of Appeals in cases substantially similar to the present one. The basis of distinction was that the expenses were only incidentally incurred in defense or perfection of title. In *Garrett v.*

⁶ The facts, in brief, in the *Selig* case are: that the taxpayer and her husband had been business partners; that a substantial part of the business profits were invested by the husband in rental real estate and that title was taken in his name for convenience; that the husband, at all times, recognized the wife's title in the property; that taxpayer reported and paid taxes on the income received from the rental property and that when the husband died title to the rental property passed into the hands of the executors of his estate where it was subject in full to estate taxes and administration charges.

Crenshaw,⁷ 196 F. 2d 185 (C.A. 4th), the court observed (p. 187):

The cases relied on by the taxpayer are not in point. *Kornhauser v. United States*, 276 U.S. 145, 48 S. Ct. 219, 72 L. Ed. 505, involved an accounting between partners of the earnings of a partnership and the question decided was whether attorney fees paid by one of the partners defending the suit were deductible as a business as distinguished from a personal expense. *Hochschild v. Com'r*, 2 Cir., 161 F. 2d 817, related to attorneys' fees paid by director of a corporation in defense of a stockholder's derivative suit charging him with breach of fiduciary duties. *Rassenfoss v. Com'r*, 7 Cir., 158 F. 2d 764, 767, was another case of accounting between partners, the court saying: " * * * it is perfectly plain, so we think, that the main and primary purpose of the suit which petitioner defended was for an accounting and any question of title was merely incidental thereto."

In *Addison v. Commissioner*, 177 F. 2d 521 (C.A. 8th), the *Rassenfoss* and *Hochschild* cases, *supra*, were

⁷ In the *Garrett* case, *supra*, the taxpayer and his brother owned and operated a mill, a store and a filling station. The brother agreed to sell his interest and the property was sold under a deed of trust. Taxpayer paid the purchase price but took title in the name of his son who agreed to hold it in trust for the taxpayer. The son died and his widow refused to recognize the trust. Legal expenses were incurred to establish the taxpayer's title and taxpayer sought to deduct these expenses on the theory that they were incurred to protect or conserve his income producing property. The court held that the expenses were incurred to defend or perfect title and were not deductible under Section 23 (a) (2).

distinguished on the same grounds. See p. 523. In *Safety Tube Corp. v. Commissioner*, 168 F. 2d 787 (C.A. 6th), the *Kornhauser* and *Rassenfoss* cases, *supra*, were likewise distinguished. Both this Court in *Murphy Oil Co. v. Burnet*, *supra*, p. 26, and the Court of Appeals for the Second Circuit in *Levitt & Sons v. Nunan*, 142 F. 2d 795, have distinguished the *Kornhauser* case, *supra*, and determined that under the facts of that case the primary, immediate purpose of the expense was not title defense or perfection. In the *Levitt & Sons* case, *supra*, p. 797, the court pointed out that "the payment [in *Kornhauser*] was to defend the taxpayer's title to property which was itself income, i.e., shares of stock received in payment for services." In *Marsh v. Squires* (W.D. Wash.), decided October 28, 1947 (38 A.F.T.R. 1581), cited by taxpayer (Br. 11) the trial court in discussing the nature of the legal proceedings which originated the expenses in question said (p. 1584):

In the complaint he sought, not so much to acquire title to any interest that he might have in these claims, but he sought ~~in~~ accounting, he sought a receivership, and incidentally he sought a decree vesting in him a specific interest in the property, and he sought a dissolution of the partnership.

So I think the Court is on sound ground when I conclude that the matter of title to the property was merely incidental. The primary purpose of the suit was to secure a partnership interest in the accumulation over the years, in this case alleged to have been a hundred thousand dollars.

Taxpayer (Br. 14-16) contends that the fees paid to the attorney and accountant were connected with the management, conservation or maintenance of property held for the production of income and consequently were deductible. To establish this proposition he points out (Br. 14-15) that income producing property was involved in the law suit and that that property accounted for substantially all of his yearly income either directly or indirectly. From these statements and from the citation of *Baer v. Commissioner*, 196 F. 2d 646 (C.A. 8th),^{*} for the proposition that the law suit had a direct relation to income producing "property" (Br. 15), the taxpayer apparently suggests that this Court somehow infer that the services of the attorney and the accountant were directly connected with and proximately related to the conservation of income producing property. To further support his contention, taxpayer asserts that the executor's request for the appointment of a receiver "to take over all of the assets in the control of the corporations * * * would have seriously affected the management of the corporations from which Appellant received income." (Br. 15.) Taxpayer's contention and his supporting arguments are without merit. The arguments fail to show a direct relation be-

^{*} The *Baer* case, *supra*, is entirely different from the present case and therefore does not support the proposition for which it was cited. The taxpayer's liability because of the marital relation to pay his wife a share of his property was recognized and therefore, the legal expenses he paid were not for the purpose of defending his title but were for the purpose of working out a settlement which would best protect the income producing property and would at the same time discharge the taxpayer's liability. See. pp. 649-650 of the opinion.

tween the services rendered and the ordinary functions of conservation and management of income producing property. Moreover, there is no proof supplied that the primary purpose for the incurrence of the expense was not as the Tax Court determined.

Taxpayer's argument does not recognize the limited purpose for which Section 23 (a) (2) was enacted, nor the restricted meaning given to the terms "management, conservation or maintenance" as a result of this restricted purpose. Congress only intended to correct the situation created by the decision in *Higgins v. Commissioner, supra*, and to allow deductions for the type of general expenses there involved.

In *Bowers v. Lumpkin*, 140 F. 2d 927 (C.A. 4th), certiorari denied, 322 U.S. 755,⁹ the court discussed the reasons why Section 23 (a) (2) was added to the Code in order to interpret and give meaning to the phrase management, conservation or maintenance of property held for the production of income. The court pointed out the fact that the decision in the *Higgins* case, *supra*, prompted congressional action and took note in the following words of the limited class of

⁹ The *Bowers* case, *supra*, in many material respects is essentially the same as the present case. The taxpayer had a life interest under a trust created for her benefit by the will of her former husband in one-half the stock of a corporation which owned valuable rights in the sale and distribution of Coca Cola syrup. She purchased the remaining stock of the corporation from trustees to whom it had been bequeathed to establish and maintain an orphanage. Thereafter, taxpayer incurred litigation expenses in successfully defending a suit instituted against her by the state of South Carolina to invalidate the sale and to account for profits.

expenses which Congress intended to make deductible (p. 928) :

Under the earlier statutes it had been held that investors not engaged in the investment business could not deduct expenses such as salaries, clerk hire or office rent incurred in connection with the earning or collection of taxable income, or in looking after one's own investments in stocks and bonds. See, *Higgins v. Commissioner*, 312 U.S 212, 61 S. Ct. 475, 85 L. Ed. 783, decided February 3, 1941. To mitigate the harshness of this rule Congress in 1942 eliminated the requirement that the expenses to be deductible must be incurred in connection with a trade or business.

The court went on to observe significantly (p. 929) that—

It is contended that the phrase “all the ordinary and necessary expenses” in the amendment covers more ground than it did in the original act because the amendment expressly authorizes a deduction for expenses paid “for the management, conservation, or maintenance of property held for the production of income”; and the word “conservation is said to be particularly pertinent in the pending case where the expenses were incurred in the protection of income producing stock from adverse attack. But the term “conservation” can be given effect if it is limited to expenses ordinarily and necessarily incurred during the taxable year for the safeguarding of the property, such as the cost

of a safe deposit box for securities. The term cannot be given the meaning contended for by the taxpayer without losing sight of the purpose which Congress intended to accomplish and the settled meaning that the phrase ordinary and necessary expenses has been given in the administration and re-enactment of the federal tax statutes.

The income producing property to which the taxpayer would relate the legal and accounting expenses is only vaguely identified. Taxpayer (Br. 14) recognizes that all the various items which the executor alleged to be community property were not income producing property. He admits (Br. 14) that the household furnishing, the Cadillac, the lot and house located at 641 Toyopa Drive and the small bank deposits were not income producing property which he held. Taxpayer, however, does assert (Br. 14) that "the shares of stock in the various corporations, outstanding loans, and note, made to the corporations were all income producing and were reported on Appellant's 1949 income tax return." Taxpayer (Br. 14-15) appears to be undecided whether the club memberships, the so-called unpaid salary [which taxpayer denied was owing to him (R. 36-40)] and the increased equity in the corporations [which taxpayer (R. 41) denied actually existed and alternatively claimed to be unascertainable in amount, if it did exist] were items of income producing property. It is interesting to note that taxpayer does not attempt to trace any income which he received in 1949 to this property which he avoids specifically identifying as income producing property held by him.

It is, therefore, clear that the only substantial property, involved in the legal proceedings, which taxpayer held for the production of income was the corporate stock of the various corporations.¹⁰

It is equally clear, as shown above, that the services of the taxpayer's attorney and accountant were rendered for the immediate purpose of protecting title to these corporate stocks.

In the *Lykes v. United States* case, *supra*, it was said (pp. 125-126) :

It [Section 23 (a) (2)] has been applied to expenses on the basis of their immediate purpose rather than upon the basis of the remote contributions that they might make to the conservation of taxpayers income producing assets by reducing his general liabilities. See *McDonald v. Commissioner*, *supra*, 323 U. S. at pages 62-63, S. Ct. at page 98.

* * *

¹⁰ The loans and note accounted for only an insignificant amount of taxpayer's total income for 1949. Taxpayer's income tax return for 1949 shows (R. 62) :

Interest Received :

Metropolitan Finance Corporation of California	\$ 208.57
Investors Realty Corporation	201.50
Jack H. Perle	1,080.26
Collector of Internal Revenue on income tax refund	12.79
	<hr/>
Total	\$1,503.12

No mention is made in the executor's complaint of a note to Jack Perle and taxpayer (Br. 14) refers only to loans and note made to the corporations as income producing property. Consequently it would appear that only \$422.86 (\$1,503.12 less \$1,080.26) of taxpayer's total income for 1949 was attributable to loans and notes made to the corporations.

It is not a ground for defense that the claim if justified will consume income producing property of the defendant.

In both *Addison v. Commissioner, supra*, and *Safety Tube Corp. v. Commissioner, supra*, the taxpayers made essentially the same argument as is made by the present taxpayer and both courts rejected this argument holding it to be invalid. In the *Addison* case,¹¹ *supra*, the court in discussing the taxpayer's argument said (p. 523):

Petitioner does not seriously question the correctness of this rule or principle [that costs of defending title are not deductible] but contends that the litigation did not involve the defense or protection of her title but rather that the suit was in the nature of a suit for an accounting. A study of the opinion of the Supreme Court in *Shaw v. Addison, supra*, and of the undisputed findings in the instant case, convinces us that the petitioner here was called upon to defend her title in the litigation in which she made these expenditures. There was in fact no accounting and the only condition under which an accounting could have been

¹¹ In this case the taxpayer's right to property which had been given her and which she had converted into other property was challenged in legal proceedings. The positions of the parties in the litigation and the requests in their wherefore clauses were essentially the same as in those of the executor and taxpayer in the state court proceedings. After analyzing the character of the litigation to which the expenses sought to be deducted were attributed, the court concluded that the expenses were incurred to defend title and were not deductible.

had was the failure of the defendant in that action to make good her title and claim to the property involved. Certainly plaintiff's right to an accounting in that litigation could only have accrued on proof of title in the plaintiffs and, consequently, proof of lack of title in defendant.

The same sort of answer to the same sort of argument was given by the Court of Appeals for the Sixth Circuit in the *Safety Tube Corp.* case, *supra*. See p. 790. See also *Roberts v. United States*, 115 C. Cls. 428.

Clearly, here taxpayer's expenses were primarily related to defense of his title and are not deductible.

CONCLUSION

The Tax Court's decision is correct and should be affirmed.

Respectfully submitted,

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January, 1954.

APPENDIX

Internal Revenue Code:

Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [as amended by Section 121 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses*—

* * * * *

(2) *Non-Trade or Non-Business Expenses*.—

In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

Sec. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule*.—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

(2) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

* * * * *

(26 U.S.C. 1946 ed., Sec. 24.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.23(a)-15 [as amended by T.D. 5513, 1946-1 Cum Bull. 61, and T.D. 5331, 1944 Cum Bull. 98]. *Nontrade or nonbusiness expenses.*—(a) *In general.*—Subject to the qualifications and limitations in chapter 1 and particularly in section 24, an expense may be deducted under section 23(a)(2) only upon the condition that:

(1) it has been paid or incurred by the taxpayer during the taxable year (i) for the production or collection of income which, if and when realized, will be required to be included in income for Federal income tax purposes, or (ii) for the management, conservation, or maintenance of property held for the production of such income; and

(2) it is an ordinary and necessary expense for either or both of the purposes stated in (1) above.

The term “income” for the purpose of section 23(a)(2) comprehends not merely income of the taxable year but also income which the taxpayer has realized in a prior taxable year or may realize in subsequent taxable years; and is not confined to recurring income but applies as well to gains from the disposition of property. For example, if defaulted bonds, the interest from which if received would be includible in income, are purchased with the expectation of realizing capital gain on their resale, even though no current yield

thereon is anticipated, ordinary and necessary expenses thereafter incurred in connection therewith are deductible. Similarly, ordinary and necessary expenses incurred in the management, conservation or maintenance of a building devoted to rental purposes are deductible notwithstanding that there is actually no income therefrom in the taxable year, and regardless of the manner in which or the purpose for which the property in question was acquired. Expenses incurred in managing, conserving, or maintaining property held for investment may be deductible under this provision even though the property is not currently productive and there is no likelihood that the property will be sold at a profit or will otherwise be productive of income and even though the property is held merely to minimize a loss with respect thereto. The expenses, however, of carrying on transactions, which do not constitute a trade or business of the taxpayer and are not carried on for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income, but which are carried on primarily as a sport, hobby, or recreation are not allowable as nontrade or non-business expenses.

Expenses, to be deductible under section 23(a) (2), must be "ordinary and necessary," which presupposes that they must be reasonable in amount and must bear a reasonable and proximate relation to the production or collection of taxable income or

to the management, conservation, or maintenance of property held for the production of income.

(b) Except for the requirement of being incurred in connection with a trade or business, a deduction under this section is subject to all the restrictions and limitations that apply in the case of the deduction under section 23(a)(1) (A) of an expense paid or incurred in carrying on any trade or business. This includes restrictions and limitations contained in section 24. Section 24(a)(5) disallows any amount otherwise allowable as a deduction (whether under section 23(a)(2) or otherwise) which is allocable to one or more classes of tax-exempt income, other than interest, and has the effect in addition of disallowing a deduction under section 23(a)(2) for amounts otherwise allowable under that section which are allocable to tax-exempt interest. Thus, any amount allocable to the production or collection of one or more classes of income which is not includible in gross income or to the management, conservation, or maintenance of property held for the production of such income is not deductible under section 23(a)(2). Nor does section 23(a)(2) allow any expenses which are disallowed by any of the provisions of chapter 1.

Capital expenditures, and expenses of carrying on transactions which do not constitute a trade or business of the taxpayer and are not carried on for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income, but

which are carried on primarily as a sport, hobby, or recreation are not allowable as nontrade or non-business expenses. The question whether or not a transaction is carried on primarily for the production of income or for the management, conservation, or maintenance of property held for the production or collection of income, rather than primarily as a sport, hobby, or recreation, is not to be determined solely from the intention of the taxpayer but rather from all the circumstances of the case, including the record of prior gain or loss of the taxpayer in the activity, the relation between the type of activity and the principal occupation of the taxpayer, and the uses to which the property or what it produces is put by the taxpayer.

Among expenditures not allowable under section 23(a)(2) are the following: Commuters' expenses; expenses of taking special courses or training; expenses for improving personal appearance; the cost of rental of a safe-deposit box for storing jewelry and other personal effects; and expenses such as expenses in seeking employment or in placing oneself in a position to begin rendering personal services for compensation, campaign expenses of a candidate for public office, bar examination fees and other expenses incurred by physicians, dentists, accountants, and other taxpayers for securing the right to practice their respective professions.

Fees for services of investment counsel, custodian fees, clerical help, office rent, and similar ex-

penses paid or incurred by a taxpayer in connection with investments held by him are deductible under section 23(a)(2) only if (1) they are paid or incurred by the taxpayer for the production or collection of income, or for the management, conservation, or maintenance of investments held by him for the production of income; and (2) they are ordinary and necessary under all circumstances, having regard to the type of investment and to the relation of the taxpayer to such investment.

Ordinary and necessary expenses paid or incurred in connection with the management, conservation, or maintenance of property held for use as a residence by the taxpayer are not deductible. However, ordinary and necessary expenses paid or incurred in connection with the management, conservation, or maintenance of property held by the taxpayer as rental property are deductible even though such property was formerly held by the taxpayer for use as a home.

Reasonable amounts paid or incurred by the fiduciary of an estate or trust on account of administration expenses, including fiduciaries' fees and expenses of litigation, which are ordinary and necessary in connection with the performance of the duties of administration are deductible under this section, notwithstanding that the estate or trust is not engaged in a trade or business, except to the extent that such expenses are allocable to the production or collection of tax-exempt income. But see section 29.162-1 for disallowance of such

deductions to an estate where such items are claimed as a deduction under section 812(b) in computing the net estate subject to the estate tax.

Reasonable amounts paid or incurred for the services of a guardian or committee for a ward or minor, and other expenses of guardians and committees which are ordinary and necessary, in connection with the production or collection of income inuring to the ward or minor, or in connection with the management, conservation, or maintenance of property, held for the production of income, belonging to the ward or minor, are deductible.

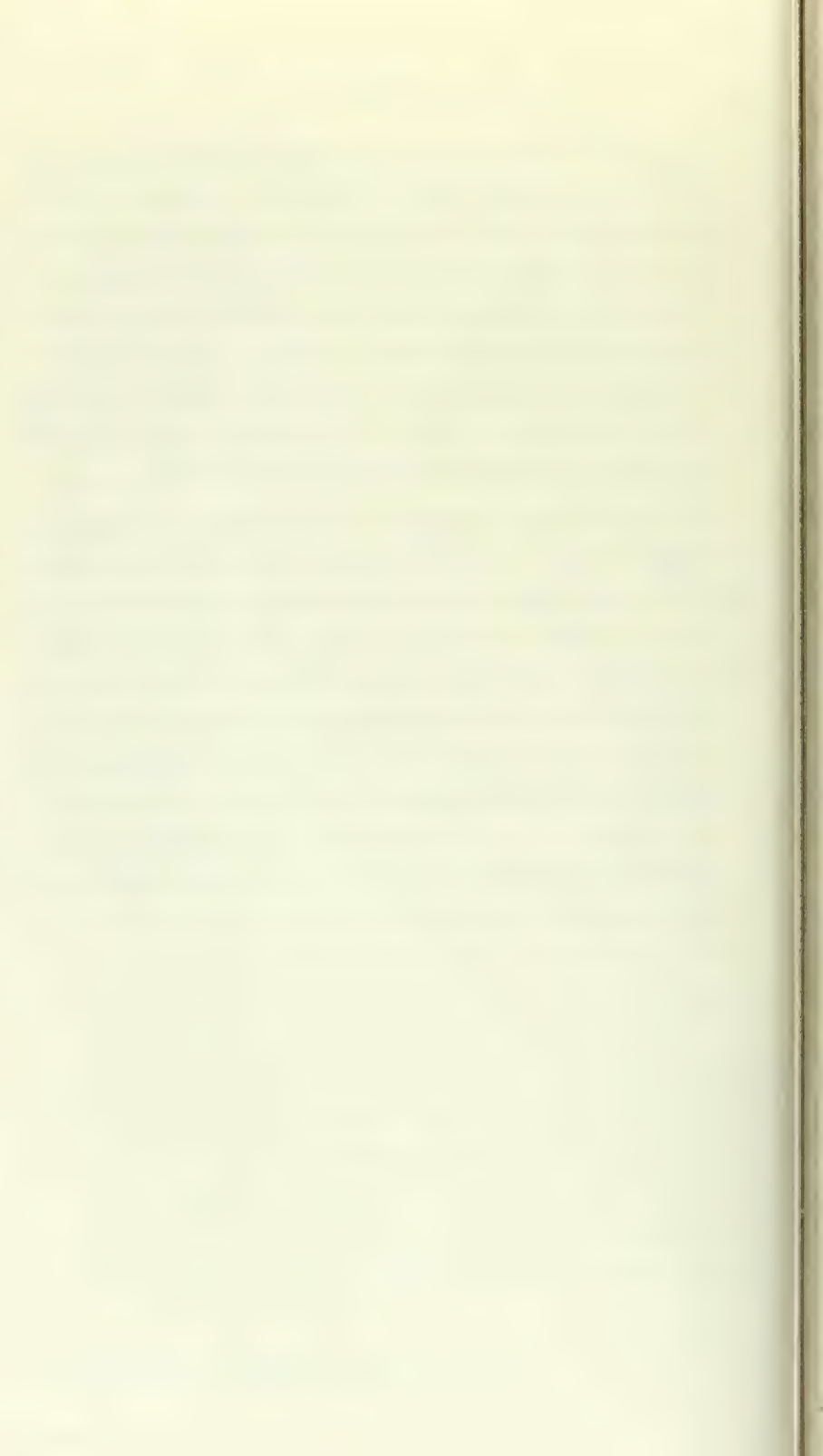
Expenditures incurred in defending or perfecting title to property, in recovering property (other than investment property and amounts of income which, if and when recovered, must be included in income), or in developing or improving property, constitute a part of the cost of the property and are not deductible expenses. Attorneys' fees paid in a suit to quiet title to lands are not deductible; but if the suit is also to collect accrued rents thereon, that portion of such fees is deductible which is properly allocable to the services rendered in collecting such rents. Expenditures incurred in protecting or asserting one's rights to property of a decedent as heir or legatee, or as beneficiary under a testamentary trust, are not deductible expenses. Expenses paid or incurred by an individual in the determination of liability for taxes upon his income are deductible. If property is held by an individual for the production of income, amounts ex-

pended in determining a property tax imposed with respect to such property during the period when so held are deductible. Expenses paid or incurred by an individual in determining or contesting any liability asserted against him do not become deductible, however, by reason of the fact that property held by him for the production of income may be required to be used or sold for the purpose of satisfying such liability. Thus, expenses paid or incurred by an individual in the determination of gift tax liability, except to the extent that such expenses are allocable to interest on a refund of gift taxes, are not deductible, even though property held by him for the production of income must be sold to satisfy an assessment for such tax liability or even though, in the event of a claim for refund, the amount received will be held by him for the production of income.

The deduction of an item otherwise allocable under section 23(a)(2) will not be disallowed simply because the taxpayer also had an election under chapter 1 to treat it as a capital expenditure, rather than to deduct it as an expense. (See section 24(a)(7).) Where, however, the item may properly be treated only as a capital expenditure or where it was properly so treated under an option granted in chapter 1, no deduction is allowable under this section; and this is true regardless of whether any basis adjustment is allowed under section 113.

(c) The provisions of section 23 (a)(2) are not intended in any way to disallow expenses which would otherwise be allowable under section 23(a)(1) or the regulations applicable thereto, or under any other section of the Internal Revenue Code or the regulations applicable thereto. Double deductions are not permitted. Amounts deducted under one provision of the Code cannot again be deducted under any other provision thereof.

Sec. 29.24-2. *Capital Expenditures*.—Amounts paid for increasing the capital value or for making good the depreciation (for which a deduction has been made) of property are not deductible from gross income. (See section 23(1).) Amounts expended for securing a copyright and plates, which remain the property of the person making the payments, are investments of capital. The cost of defending or perfecting title to property constitutes a part of the cost of the property and is not a deductible expense. * * *



No. 14059.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

E. S. SHIPP,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 14059.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

E. S. SHIPP,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT'S REPLY BRIEF.

I.

The Tax Court Was Not Correct When It Concluded That the Fees Paid for Services Rendered in the Executor's Lawsuit Was to Defend Appellant's Title.

As stated in Respondent's Brief (Resp. Br. 18) Appellant does not challenge the principle of law that costs of defending or perfecting title are capital expenditures and not deductible under Section 23(a)(2), but Appellant does challenge the Tax Court's determination that the lawsuit in which Appellant was involved was in defense of title as that term is used in the cases and regulations.

Appellant also challenges the interpretation by the Respondent of the lawsuit filed by the Executor and the answer of Appellant. Respondent in his brief (Resp. Br. 14) states that the Executor claimed in his lawsuit that title to a one-half interest therein vested in the deceased wife's estate and that taxpayer denied this claim and that full title vested in him and in the same paragraph states as follows: "This title claim and the denial of the title claim fixed the nature of the proceedings and the expenses attributable thereto as title expenses." A review of the complaint [R. 20, Ex. 1] and the answer [R. 34, Ex. 2] fails to reveal any such claim of title. The only place that title is mentioned is in the prayer [R. 32] where the relief is asked that title be quieted and even here this is qualified by the further request that the respective interests of the parties in said property be determined.

The legal issues for the court to determine are set forth in the Executor's complaint, Paragraphs XIV and XV [R. 29]. In Paragraph XIV [R. 29] the complaint sets forth a controversy and that the respective interests of the parties be declared fixed and determined. This does not infer a title action but is a pleading of facts for declaratory relief (Cal. Code Civ. Proc., Sec. 1060, App.).

In Paragraph XV [R. 29] the complaint sets forth facts pleading for a receivership and a defense of such an action is not defense of title.

The Respondent, in making the statement that the Executor was claiming that certain property was community

and the Appellant claiming that it was his separate property and thus an action over title, overlooks the real origin and nature of the lawsuit and the expenses involved.

This court in *Eustace v. Lynch*, 80 F. 2d 652, citing 5 Cal. Jur. p. 282, Sec. 7, recognized the definition of community property as follows:

"In general, under this system, whatever is acquired by the efforts, ability or personal qualities of either spouse, constitutes a part of the community property. Thus, the earnings of the wife as well as the husband are community property, and this includes gains from business ventures conducted by either, and from contracts for services of whatever nature; and money borrowed on personal credit."

The Executor in his complaint asked the court to declare and determine the respective interests of the parties to the property. The only way that the court can determine and declare that property is community or separate is by an accounting of all the earnings, gains from business ventures conducted by either, and from contracts for services of whatever nature; and money borrowed on personal credit during the marriage. As set forth in Appellant's Brief (Br. 8) the District Court of Appeal recognized the nature of the action as being one for an accounting.

The facts of this case and the relief asked differs from the cases cited by Respondent wherein specific title to property was the primary issue and not just incidental.

II.

**Taxpayer's Contentions Are Supported by the Record
and the Authorities.**

The Respondent in his brief (Br. 21) states that the Court of Appeal characterized the action as a contest over title to property and puts emphasis upon words of that court in support of his statement. As pointed out under Point I herein, the court to determine the nature and extent of community property must do it by an accounting.

The Respondent in his brief (Br. 22) attempts to distinguish Appellant's authorities on the basis that in those cases title was only incidental thereto. That is true and it is also true that in the lawsuit in which Appellant was involved title was only incidental thereto.

Respondent and the tax court in their analysis overlook the true nature of the lawsuit and the basis upon which it is founded. The Executor in his lawsuit was claiming certain property was community, in other words he was claiming that earnings of the husband, gains from business ventures, and from contracts for services during the marriage was now in the form of the property which he claimed. This would, during the time of marriage, all be subject to the income tax laws as profits from the community relationship and is itself income for which the Executor asks an accounting.

The courts have recognized the similarity of community property to partnership property.

Goodell v. Koch, 282 U. S. 188-122, 75 L. Ed. 247 at page 249;¹

Metropolitan Life Ins. v. Skov, 51 Fed. Supp. 470 at page 474;

Mabie v. Whittaker, 39 Pac. 174;

Coleman v. Coleman, 293 S. W. 695.

In California in the case of *Witaschek v. Witaschek*, 56 Cal. App. 2d 277 at page 281, it was stated as follows:

“The capital which the husband brings to the *marriage partnership* (emphasis ours) is his own separate property, but it is a question for the court to determine what portion of the profits thereafter arises from the use of this capital and what part arises from the activity and personal ability of the husband. That portion of the income due to the ‘personal character, energy, ability and capacity of the husband’ is community property.” (Citing cases.)

Thus the facts in this case come squarely within the facts of the cases cited by Appellant in his opening brief in that Appellant in defending the action was defending an accounting action to determine community property which in itself is income.

Respondent's attack on Appellant's citation of *Baer v. Commissioner*, 196 F. 2d 646 (C. A. 8th), is without merit, and in his note on the facts states it is entirely

¹In *Goodell v. Koch*, at page 249, it was stated “The Arizona Supreme Court has likened the community to a partnership.”

different from the case involved (Resp. Br. 26). In the facts of that case as stated on page 647 of the opinion, Mary E. Baer had an action on file claiming 5000 shares of the stock of Stix, Baer and Fuller. The facts as more fully set forth in the Tax Court case cited *Arthur B. Baer*, 16 T. C. 1418 (No. 172) shows that the said 5000 shares were valued at \$50,000, in addition she claimed \$80,000 damages for detention of said stock. She also claimed a sum of money equal to one-sixth of his estate. The property settlement negotiated by the attorneys provided that she would be barred from asserting any dower rights in the personal property of the husband.

There is no difference between the attorneys settling the claims for property by Mary Baer against Arthur Baer favorably to him without court action than there is in the Executor's lawsuit where the attorneys resisted the claims of the Executor in a court action, said resistance being favorable to husband.

Respondent in his brief [Resp. Br. 27) sets forth a limited purpose for which Section 23(a)(2) was enacted and cites *Bowers v. Lumpkin*, 140 F. 2d 927 (C. A. 4th), in support thereof. This case has no application to the facts in Appellant's action as it was one primarily for title and not for an accounting or determination of the extent of property.

Conversely to the *Bowers v. Lumpkin* case (*supra*) the ruling does not imply that expenses allowed under Section 23(a)(2), Internal Revenue Code, are any less deductible than those allowed under Section 23(a)(1). (*Bingham Trust v. Commissioner*, 325 U. S. 365, 89 L. Ed. 1670, at 1677.)

Respondent attacks the property involved as not being income producing (Resp. Br. 29). Appellant has sufficiently pointed out in his opening brief that the property involved was income producing and has pointed out herein that if the Executor had prevailed in having a determination that the property was community it in itself was income or profits to the community partnership.

Clearly here the facts and the record support the proposition that the attorneys' and accountants' fees were incurred in defense of an action involving accounting, declaratory relief, receivership and a determination of the nature of property held by Appellant, and if title was involved at all it was only incidental thereto. The expenses were reasonable and necessary and were made for the management, conservation or maintenance of property held for the production of income.

Conclusion.

The case should be remanded for entry of a judgment in favor of Appellant and against Respondent.

Respectfully submitted,

DEXTER D. JONES,

RAYMOND V. HAUN,

HENRY SCHAEFER, JR.,

E. J. CALDECOTT,

By DEXTER D. JONES,

Attorneys for Appellant.

Dated: January 29, 1954.

APPENDIX.

California Code of Civil Procedure:

Sec. 1060 (Declaratory relief) Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

No. 14,060

IN THE

United States Court of Appeals
For the Ninth Circuit

Harry Simmonds,

Appellant,

vs.

United States of America,

Appellee.

APPELLANT'S OPENING BRIEF

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IN THE

United States Court of Appeals For the Ninth Circuit

Harry Simmonds,

Appellant,

vs.

United States of America,

Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from an order of the District Court of the United States, for the Northern District of California, Northern Division, denying appellant's motion to be relieved from summary judgment and denying appellant's motion for leave to file a supplemental complaint, arising out of a previous judgment of the District Court condemning and fixing the value of certain property in the County of Yolo, State of California.

Jurisdiction in the District Court was claimed in the previous judgment under Section 591, Title 33, U.S.C., and Section 257, Title 40, U. S. Code, and appellant claimed jurisdiction in the District Court to set aside its own previous judgment under Rule 60 (b) of the Federal Rules of Civil Procedure, Section 2072, Title 28, U. S. Code.

Appellant's motions for relief from the summary judgment and for leave to file a supplemental complaint were denied on June 30, 1953 (R. 40).¹ Notice of Appeal was filed on July 8, 1953 (R. 41). The jurisdiction of this court is invoked under 28 U. S. C. 1291.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Northern District of California, Northern Division, Honorable Dal Lemmon presiding, denying appellant's motions for relief for a summary judgment and for leave to file a supplemental complaint.

The history of this action is long. On August 5, 1947, the United States filed a complaint in condemnation to acquire the right and easement for a 15 year period to deposit spoil and other matter excavated in the improvement and maintenance of the Sacramento River. Thereafter the complaint was amended to provide for the commencing of the 15 year period on June 15, 1943. Appellant answered, denying the authority of the United States to take, the necessity of the taking, the sufficiency of the funds available, the authority to pay just compensation, and that the use constituted a public use. Appellant amended his answer to define the boundary of his tract more fully. ²

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1. Reference to the Transcript of Record is herein indicated by (R.)
 2. See Record and Transcript of appeal, Harry Simmonds, Appellant v. United States of America, Appellee, No. 12969.

On August 11, 1948, the United States filed a declaration of taking which contained a description of appellant's property different from that in the complaint. The complaint was amended to conform to the declaration. Judgment on the declaration of taking was entered by the court on August 12, 1948. ³

In November, 1948, the United States filed a third amendment to the complaint to change the estate taken in appellant's property from an easement to the fee. Both the declaration and the judgment on it were amended accordingly. ⁴

Appellant filed an answer to the third amendment to the complaint denying the necessity for the United States to condemn the whole fee title and that the taking was in violation of the Constitution of the United States.

Other amendments and answers were filed by both parties, and the cause went to trial. The question of valuation was submitted to the jury; the court found as to the question of the number of acres taken and against the appellant on all the other issues submitted to it.

Judgment was entered on December 14, 1950. Appellant's motion for a new trial was denied on February 13, 1951. The prior appeal to this court was taken on three questions: (1) necessity of the taking of an easement as

3. See Record and Transcript of appeal, Harry Simmonds, Appellant v. United States of America, Appellee, No. 12969.

4. See Record and Transcript of appeal, Harry Simmonds, Appellant, v. United States of America, Appellee, No. 12969.

against the taking of a fee; (2) sufficiency of the evidence to support the jury's findings as to valuation; (3) whether the court's finding as to the acreage was erroneous. The case on appeal (No. 12, 969) was decided in an opinion filed October 21, 1952, which decided all points for appellee United States.

On December 13, 1951, after No. 12,969 had been submitted to this Court but before the decision had been reached, appellant in propria persona filed with the United States District Court for the Northern District of California, Northern Division, a "Move to Set Aside Judgment Because of Fraud and Error Suit In Trespass and Damage to Property, and Trespass On Case, and Conversion" (sic). (R. 3-13). Appellee United States answered on February 29, 1952 (R. 14-26) and on March 7, 1952 filed a "Motion for Summary Judgment Under Rule 56 of Federal R. C. P." (R. 27-28) together with an "Affidavit In Support of Motion For Summary Judgment" of Franklin A. Dill. (R. 29-30). The motion was ordered submitted on memoranda on November 5, 1952. The only issue for the court to decide was whether there was a factual question as to whether a fraud had been perpetrated by the agents of appellee. (R. 65) Appellee's motion for summary judgment was granted on May 21, 1953. (R. 31) Appellant in propria persona filed a "Motion For New Trial on Newly-Discovered Evidence" on May 26, 1953. (R. 32-39) Subsequently, appellant acquired counsel who filed a motion for leave to file a supplemental complaint and a motion that appellant be relieved of summary judgment and a hearing was held on all these motions on June 8, 1953. (R. 67-81) All these

motions were denied by the court on June 30, 1953. (R. 40). Notice of Appeal was filed by appellant on July 8, 1953.

FACTS

Appellant acquired a certain tract of land in Yolo County, California, in 1944. The tract was located on the Sacramento River, and in furtherance of a flood control project, the United States Engineers in 1945 entered upon the land, dumped sand and debris and laid waste to the trees and brush on it. Eventually the appellant commenced suit in the State Courts against certain individual agents of the United States who were responsible for the injury to his tract of land. After a trial during which appellant prosecuted his own case in propria persona, judgment was entered for defendants, the agents of the United States who were responsible for the injury to his tract of land. The United States commenced the condemnation action to which this appeal is directed. (Record and Transcript on Appeal, No. 12,969).

Appellant's pleading of December 13, 1951, "Motion to set aside judgment because of fraud and error, etc." raised the issue of fraud with respect to the signature of a Colonel of the United States Army Corps of Engineers on a plat of appellant's tract of land taken by condemnation. (R. 3-5) The answer of the United States denied the allegations of fraud and forgery in appellant's pleading. (R. 14-15).

Appellee's Motion for Summary Judgment was based on the grounds of a lack of consent of the sovereign to be sued, a lack of jurisdiction in the court of the alleged

cause of action, the statute of limitations, and the alleged failure of the complaint to state a cause of action. (R. 27).

At the first hearing on the Motion for Summary Judgment on August 19, 1952, the court and the counsel agreed that the tort cause of action in appellant's pleading of December 13, 1951, should be dismissed. (R. 50-53) Insofar as the fraud was concerned, counsel for the United States repeatedly asserted that appellant knew of the forgery from the time of the trespass suit in the state court in 1948. (R. 53-54). The question of the disposition of the Motion for Summary Judgment with respect to the fraud was put over until the Court of Appeals for the Ninth Circuit had decided case No. 12,969, then pending. (R. 57).

On the occasion of a further hearing on the Motion for Summary Judgment and at the insistence of counsel for the United States, counsel for the appellant stated that appellant had admitted to him that he knew about the forged signature on the plat as early as January, 1948.

After argument mainly concerning *res adjudcata* and other matters the court indicated its intention to rule in favor of the United States on the question of the Motion for Summary Judgment unless appellant's counsel could by memorandum convince the court of the wrongness of its legal conclusions. (R. 58-66).

On May 21, 1953 the District Court granted the United States' Motion for Summary Judgment. (R. 31) On May 26, appellant in *propria persona* filed another pleading, entitled "Motion for a New Trial on Newly Discovered Evidence." (R. 32-39).

The May 26 pleading indicated that even though the forgery of the signature on the map appeared in testimony concerning the trespass in January, 1948, that the appellant did not remember it or appreciate its significance, and that

“in the guise of Condemnation for the purpose of improving navigation, the Government by her agents filed a map of subject property bearing a signature in part imitative of the signature of one Col. C. H. McNutt, and Plaintiff contends not properly authorized and a further false signature falsely notarized and sworn second amendment affidavit and not properly authorized, the purpose thereof to conceal and distract by misdirection of controversy from the original false signature, and numerous amending maps and descriptions, and takings pursuant to enlarging the scope of conflict so that the original false signature was submerged from the direction of plaintiff.” (sic) (R. 32-33).

Furthermore, the May 26 pleading contained an allegation

“And that is about all except that Mr. Parish will prove that Mr. Dill signed Mitchel Bourquins name to the second amendment to the complaint in No. 5874, sworn statement notarized by Louis Vasquez, and Mr. Harry Simmonds will testify that Mr. Morton, Mr. Pechacek, and Mr. South all claimed that Col. C. H. McNutt signed the forged signature, that they did not see McNutt sign it, but that they recognized McNutt’s signature, and it looked like McNutt’s signature.” (sic) (R. 36).

Thereafter, appellant by counsel moved to be relieved of the summary judgment and for leave to file a supplemental complaint, and at the hearing on June 8, 1953, both motions came up for argument. During the course of the argument the following exchange occurred:

MR. DAILY: Now, in addition, your Honor, to the forged map there is also another forgery, to the second amended complaint which was signed by Mitchell Bourquin. In other words, the evidence shows that the signature is not Mitchell Bourquin's, that the affidavit was made in front of a Notary Public and it is a false affidavit, and I submit here the verification which shows that the signature of A. Mitchell Bourquin is a forgery.

THE COURT: What is this in?

MR. DAILEY: That is in the second amended complaint of the original condemnation suit. So, therefore, that makes the second amended complaint no good.

THE COURT: Well, there need be no verification of a complaint. (R. 71).

The court entered an order denying all of Appellant's pending motions on June 30, 1954. (R. 40).

SPECIFICATION OF ERRORS

1. The court erred in granting appellee's motion for a summary judgment and in denying appellant's motion to be relieved of summary judgment because an issue of fact had been raised.

2. It was error for the court to deny appellant's motion for leave to file a supplemental complaint.

ARGUMENT

I. APPELLANT'S MOTION TO BE RELIEVED OF SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED SINCE AN ISSUE OF FACT HAD BEEN RAISED DURING THE PLEADINGS AND THE ARGUMENTS.

Appellant's motion to be relieved from the judgment in the condemnation case was based on the fact that various agents of the United States had fraudulently misled both the District Court and the appellant into believing that the plat of tract No. 7 had been officially approved by a person in authority, namely a Colonel in the United States Army Corps of Engineers.

It is true that there is some indication that appellant had an opportunity to learn of the forgery as early as January, 1948.

The statement of counsel that he . . . "discussed the matter with my client and he (the client) has informed me that there was a hearing and that he (the client) knew at that time" (R. 59) is not conclusive on the question of appellant's knowledge of the truth or falsity of the misrepresentation.

The single statement of counsel does not indicate finally and conclusively that appellant knew of the falsity of the misrepresentation at the time he acted on it.

As stated by the Supreme Court, the elements of fraud are:

"FIRST: That the defendant has made a representation in regard to a material fact;

SECONDLY. That such representation is false:

THIRDLY. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

FOURTHLY. That it was made with intent that it should be acted on;

FIFTHLY. That it was so acted by complainant to his damage; and,

SIXTHLY. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true. *Southern Development Company v. Silva*, (1888), 125 U. S. 247, 8 S. Ct. 881, 31 L. Ed. 678.

The single statement of counsel does not indicate conclusively that appellant lacked ignorance of the falsity of the misrepresentation at the time he acted upon it. There may have been other subsequent misrepresentations concerning the validity of the signature on the plat, or the legal significance of the testimony in the state court may have escaped appellant because the issues in that hearing were vastly different from those involved in the condemnation suit in the District Court.

Summary judgment procedure is not to determine facts, but rather to determine whether or not issues of fact exist, and "judgment cannot validly be based upon Summary trial by affidavits", and the parties are entitled to have issues of fact tried at the trial. *Lane Bryant v. Maternity Lane, Ltd. of California*, (C. A. 9, 1949), 173 F. 2d 559.

The fact that appellee is sovereign should not mitigate against appellant, because the government is bound by the same rules of practice as apply to individuals. *U. S. v. Baker Lumber Co.*, (C. C. Idaho, 1908) 169 F. 184.

We earnestly suggest that this case is

"... another of those all too numerous instances of misuse of the summary judgment procedure to cut a trial short; that here, as so often before, it has served only to prove that short cutting of trials is not an end in itself but a means to an end, and that in the conduct of trials, as in other endeavors, it is quite often true that the longest way around is the shortest way through". *Gray Tool Co. v. Humble Oil & Refining Co.*, (C. A. 5, 1951) 186 F. 2d. 365; cert. den. (1951), 341 U. S. 934, 71 S. St. 854, 95 L. Ed. 1363.

Furthermore, on appeal from a summary judgment the Court of Appeals should insofar as possible accept appellant's allegations of fact as true. *Vokal v. U S.* (C. A. 9, 1949), 177 F. 2d 61.

We, therefore, submit that it was error for the District Court below to hold that appellant had knowledge of the falsity of a signature on a plat from testimony given during a related case in a state court, which case was tried at a different time than the condemnation suit in the District Court and which case involved different issues of law and fact.

2. APPELLANT'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT SHOULD HAVE BEEN GRANTED.

In the supplemental complaint, as in the pleading of May 26, 1953, plaintiff alleged that the signature and verification of Mitchell Bourquin to the second amendment of the complaint in the original condemnation suit

were forgeries. The court rightfully ruled there need be no verification of a complaint. (R. 71)

Admittedly verification is now required in only a few instances but Rule 11, of the Federal Civil Rules of Procedure provides:

Rule 11. Signing of Pleadings. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule of statute, pleading need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Furthermore, at the time the condemnation suit was pending in the District Court and at the time that the allegedly forged and falsely verified amended complaint was filed by appellee, the Federal Rules of Civil Procedure were inapplicable to condemnation suits, except as

to appeals. Rule 81 (a) (7) at that time and up to August 1, 1951, read:

(7) In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals, but are not otherwise applicable.

Section 258, 28 U. S. Code, at the time of the condemnation suit required that

“ The practice, pleadings, forms and modes of proceedings in causes arising under section 257 of this title shall conform, as near as may be to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such district court is held, any rule of the court to the contrary notwithstanding.”

Section 446, Code of Civil Procedure of California, at the same time required only that “every pleading shall be subscribed by the party or his attorney.”

Thus, while verification is not necessary either under the old Federal procedure or the new, pleadings were and still are required to be signed by the attorney or the party. In the case of the present Rule 11, Federal Rules of Civil Procedure, the act of signing by the attorney has more than a merely formal significance. By signing, the attorney makes certain certifications and representations. Rule 11 also now provides that an unsigned pleading “may be stricken as sham and false and the action may proceed as though the pleading had not been served.”

The District Court should not have denied appellant the right to raise this issue. The pleading of May 26, 1953, as the supplemental complaint, contained allegations that the signature of the attorney was forged to the second amended complaint. (R. 32-33, 68). The court ruled that a complaint need not be verified. (R. 79).

The allegations are that the second amendment to the original complaint was unsigned and improperly verified, not merely that the verification was fraudulent. Thus, we submit it was error for the District Court below to deny appellant's motion for leave to file a supplemental complaint in this action.

CONCLUSION

It is therefore submitted that this Court should reverse the summary judgment entered for appellee in the District Court below and that this Court should reverse the District Court's denial of appellant's motion for leave to file a supplemental complaint.

Dated, Sacramento, California,

May 15, 1954.

Respectfully submitted,

Walter H. Harrington, Jr.

Thomas M. Wallner,

Counsel for Appellant.

No. 14065.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNESTO MARTINEZ-QUIROZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

NOV 5 1952

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No. 14065.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ERNESTO MARTINEZ-QUIROZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

The defendant, Ernesto Martinez-Quiroz, was indicted in three counts. Each count charged the illegal transportation of one certain alien within the United States on March 11, 1953, as follows:

Count I—Victoriano Carrillo Mesa.

Count II—Enrique Pintor Morales.

Count III—Enedina Rodriguez vda. de Arivizo.

I.

Statute Under Which Defendant Is Being Prosecuted.

The criminal portion of United States Code, Title 8, Section 1324(a) relates to the bringing in or harboring or concealing of certain aliens. The applicable subsection

of Section 1324, under which the Indictment is brought reads as follows:

"Section 1324. Bringing in or harboring or concealing certain aliens . . .

(a) Any person who

'(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto transports or moves or attempts to transport or move, within the United States by means of transportation or otherwise in furtherance of such violation of law.'

Shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000.00 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs."

II.

Synopsis of Facts.

On or about March 10, 1953, defendant Martinez arrived at Brawley, California. The defendant is engaged in business in San Fernando, California, conducting both a gasoline station and a tavern at said place. He is married and the father of five children. He has lived at San Fernando for twelve years.

On the occasion prior to his arrest the defendant left San Fernando for Brawley for the express purpose of negotiating in the purchase of hay in the Imperial Valley. He traveled alone, and this trip was his first to the Valley.

Upon arriving at Brawley, the defendant attempted to purchase some hay but without success. In Brawley, he went to the Mexican area which is concentrated a short way from the business section of the city.

The Mexican settlement is replete with numerous bars. There are a few stores but the principal establishments consist of bars.

The defendant frequented a few of these bars where he made acquaintances of several bartenders and waitresses. During his three-day stay at Brawley, he had occasion to drink and eat and have frequent conversations with the help at these cafes. It was during these conversations that he chanced to ascertain that several girls were dissatisfied with their pay and expressed a desire to work elsewhere, and according to defendant, he told the aliens that if at any time they wanted to work at his place he would be glad to employ them.

According to the aliens, however, they stated the defendant solicited them for employment in his cantina at San Fernando.

Thereafter, he returned to his home. Subsequently, after being at home a valise from one of the aliens arrived at his establishment. He did not open the valise nor have any control over its delivery. Later, the Immigration Inspection Officer came to his home and accused him of transporting aliens or encouraging same.

The defendant denied any information or any knowledge of residence of aliens in the United States. The defendant believed them to be legally in the United States. However, the women state that the defendant knew they were recent arrivals from Mexico and did not possess the proper papers for entry.

ARGUMENTS AND POINTS AND AUTHORITIES.

I.

The Court Erred in Finding the Defendant Guilty of Count III of the Indictment.

The defendant should have been adjudged not guilty because of the insufficiency of the evidence to establish his guilt beyond a reasonable doubt.

The evidence discloses that while defendant Doty, who had theretofore plead "guilty" was alleged to have been a co-conspirator with defendant Martinez, who stood trial, there was but a mere suspicion in the record to show that they either knew or had seen each other during the events recited by the prosecution.

In fact, in reading the entire testimony of the defendant, Doty, there is hardly a scintilla of evidence showing any acquaintance with Martinez or any actual transactions had between the men.

Thus, the Court in examining Doty asked the following:

"The Witness: Well, I had no contact whatsoever with the man in the room; the contact spoke to him and everything else, and made the arrangements.

The Court: Do you know anything about this suitcase?

The Witness: I absolutely know nothing about the suitcase.

The Court: Did you converse with the defendant at all before you left on this trip north?

The Witness: Not knowingly, no, sir.

The Court: What do you mean?

The Witness: I might have said something to him when I walked in the room.

The Court: Well, you might have, or you didn't?

The Witness: All right; I will say I did.

The Court: What did you say to him?

The Witness: 'Hello,' to the best of my knowledge.

The Court: Why did you say 'Hello' to him?

The Witness: I don't know.

The Court: Did you know the man?

The Witness: No.

The Court: But you said 'Hello' to him; is that it?

The Witness: That is it.

The Court: And that was all that was said?

The Witness: Yes.

The Court: And what did he say?

The Witness: I don't think he said anything in return." [Rep. Tr. p. 64, lines 1-25.]

And in identifying some contact man in the conspiracy, it is even more significant that the prosecution had believed such a man to be Martinez.

"A. He could have looked like that defendant.

Q. Well, to the best of your recollection, did he look like this defendant? A. He was similar to the defendant, yes.

Q. But you say you were so nervous, that you were in a hurry to get the girls out of the room there?

A. Yes, it was light all around the car, and I was scared somebody would see me taking them out.

Q. And then the statements made by the two girls when they said you came into the room and you had a conversation with the defendant could have been true? A. It could be true; I might have said something unconsciously to him in a matter of 'Hello,' or something like that.

Q. Now, you made arrangements with someone to take these aliens, is that correct? A. Yes.

Q. And do you know who that was? A. No, I am not sure.

Q. It could have been this defendant? A. No, it honestly wasn't this defendant.

Q. It was somebody else? A. It was somebody else—far different looking than this defendant.”
[Rep. Tr. p. 60, lines 1-24.]

“(To the witness): Do you know this man, this unknown individual that you couldn't recognize? Do you know him? Can you describe him?

The Witness: The contact man?

The Court: The man who told you to take these people somewhere.

The Witness: He was short.

The Court: Short?

The Witness: He was real short. I am not sure, I think he had a mustache, but he was young.

The Court: Was he an American or Mexican?

The Witness: No, Spanish.

The Court: His nationality was Mexican?

The Witness: No, he spoke good English. He spoke English.

The Court: Good English?

The Witness: Yes.

The Court: Tell us about his appearance, how was he dressed?

The Witness: He was dressed not like the Spanish, but more like an American would dress.

The Court: How did you meet him?

The Witness: I went into a bar and asked if they knew anyone that wanted a ride.

The Court: Why did you do that?

The Witness: Well, I needed money.

The Court: What bar did you go to?

The Witness: I guess it was the Cafetal they are talking about.

The Court: And who told you about these two women?

The Witness: He did, the little fellow.

The Court: Did he resemble this defendant here?

The Witness: None whatsoever; this man isn't definitely the man.

The Court: You are sure about that?

The Witness: I am positive on that.

The Court: How do you know he isn't the man if you don't remember whom you saw?

The Witness: He was very small, far smaller than that, he was real small.

The Court: Then why can't you remember this man here, his looks, if you saw him in the room where these two girls were; if there was this difference between them, why is your recollection so faulty as to this particular defendant?

The Witness: It is not that I am trying to withhold anything; that is the truth.

The Court: Frankly, your recital of what happened is very indefinite, and I am trying to find out just what you know about this." [Clk. Tr. p. 62, line 3, to p. 63, line 25.]

It can be seen from the excerpts of the testimony as alluded to, that a vital circumstance in the evidence linking the defendant Martinez, is missing. And furthermore, the so-called "contact man" who was described as a "short" man, and who was definitely not Martinez, was never produced in Court and the evidence remains obscure on that point.

The evidence clearly does not establish beyond a reasonable doubt the conspiracy as far as defendant Martinez is concerned. Certainly there are suspicious circumstances, and there is no denial that Martinez, while frequenting the many bars that are located in Brawley, in a concentrated area, did discuss with the waitresses the desirability of working in his bar when they would come to Los Angeles. The defendant was drinking quite freely and feeling rather gay, and it is quite likely that he gave the waitresses his address.

However, the law does not enjoin an employer from hiring an alien illegally in the United States.

It was clear that the waitresses had been working in bars in Brawley, with perhaps definite knowledge on the part of the employers that they were illegal entrants. This situation was not frowned upon apparently by the Immigration Service.

And the Court in his summation himself indicated that but for the evidence of the valise a doubt would have been created as to the guilt of the defendant.

“Now, without this suitcase there might be some doubt created, but there is no question in my mind that he told these girls where his address was, and of course, we have to assume all the way through that they were aliens, not entitled to live here, and that they were recent arrivals—recently arrived aliens.” [Rep. Tr. p. 104, lines 14-19.]

In view of the previous good character of the defendant as established by the witnesses who appeared for him, including the Chief of Police of San Fernando, the community in which he resided, should have balanced the case in his favor in view of the testimony on conspiracy.

II.

The Court Erred in Not Sustaining the Motion to Dismiss the Indictment as Presented by the Defendant Martinez on the Ground That the Statute Under Which He Was Accused Is Unconstitutional.

Defendant stands indicted on three counts for an alleged violation of the Immigration Act of 1917 as amended (Public Law, 82nd Congress) approved in December, 1952, Title 8, U. S. C., Sec. 1324(a)(2).

It is a theory of the indictment that among the acts proscribed by the statute is that of transporting within the United States, an alien, knowing that the alien was then in the United States in violation of law and having reasonable grounds to believe that the last entry of the alien into the United States occurred less than three years prior to the date of such transportation.

It is the contention of the defendant that the statute is unconstitutional under the test of the "Void for Vagueness" Doctrine.

Larzette v. New Jersey, 306 U. S. 451;

Screns v. United States, 341 U. S. 97;

Jordan v. United States, 341 U. S. 223, 230.

The due process clause of the Fifth Amendment requires that criminal statutes give due notice that an Act has been made criminal before it is done.

The Fifth Amendment provides in part as follows:

"No person shall be deprived of life, liberty, or property without due process of law."

There can be no doubt but what a criminal statute which fails to give due notice that an act has been made

criminal before it is done is an unconstitutional deprivation of due process of law.

Jordan v. United States, 341 U. S. 223, 230;

United States v. Cohen Grocery, 225 U. S. 81.

The essential purpose of the so-called "Void for Vagueness" Doctrine is to warn individuals of the criminal consequences of their conduct.

Jordan v. United States, 341 U. S. 223, 230;

Williams v. United States, 341 U. S. 97.

Consequently, a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process of law.

269 U. S. 385, 391.

The challenged statute, as amended, reads as follows:

"Any person, including the owner, operator, pilot, master, commanding officer, agent or consignee of any means of transportation who

(1) brings into or lands in the United States by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of trans-

portation or otherwise, in furtherance of such violation of law;

(3) wilfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of any alien, including an alien seaman not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law shall be punished by a fine not exceeding \$2,000.00 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs; provided, however, that for the purpose of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring;

(4) wilfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation.”

The particular acts charged in the indictment show an attempt by the Government to bring this case within the provisions of Paragraph (2), Section (a), Title 8 (Transportation of an alien unlawfully in the United States).

It is the contention of the defendant that subsection (a) as a whole under Paragraph (2) thereof, in part is fatally vague, indefinite, uncertain and untelligible in the following particulars:

Paragraphs (1), (2), (3) and (4) are as the statute now reads, in the disjunctive, by reason of the use of the word “or” at the end of the Paragraph (3). Therefore, as now punctuated, the language of paragraphs (1), (2) and (3), standing alone, is meaningless, and taken

collectively or separately, define no offense. That is to say, Paragraphs (1), (2), (3) cannot be read in conjunction with Paragraph (4) in view of the use of the disjunctive "or" at the end of Paragraph (3), and this being so, Paragraphs (1), (2) and (3) are meaningless or at least define no offense.

Defendant contends that this patent ambiguity necessarily precludes a holding that the statute so clearly defines what acts are forbidden that men of common intelligence can determine what actions are criminal and what are not.

269 U. S. 385.

Even assuming that the above mentioned patent ambiguity can be remedied by some sort of statutory construction, still the sense of Paragraph (2) cannot be reduced to one certain meaning. The phrase "knowing or having reasonable grounds to believe" that his last entry to the United States occurred less than three years prior thereto, is not clear as to which word is the antecedent of the words "he and his."

The phrase "in furtherance of such violation of law" is ambiguous. It is impossible to ascertain with any degree of certainty whether this phrase refers to violation of law by the person transported (any alien), or by the transporter (any person).

"A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application lacks the first essential of due process of law."

Connaley v. General Construction, 269 U. S. 385.

"The question whether given legislative enactments have been thus wanting in certainty has frequently been before this Court. In some of the cases the statutes were upheld; in others declared invalid. The precise point of different interpretation in some instances is not easy of statement.

"But it will be enough for present purposes to say generally that the decisions of the Court upholding statutes as sufficiently certain rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them."

International Harvester v. Kentucky, 234 U. S. 216, 221;

Collins v. Kentucky, 234 U. S. 634, 638.

Volume 48, Harvard Law Review, at pages 748, 750, discusses generally the construction to be placed upon penal statutes.

It is the contention of defendant that the above mentioned ambiguities are fatal and cannot and should not be resolved so as to embrace offenses not clearly within the statute.

Krickman v. United States, 256 U. S. 263.

The words of a criminal statute are to be such as to leave no reasonable doubt as to the intention of the Legislature and where such doubt exists, the liberty of the defendant is favored.

The only case of which we are aware that has considered the constitutionality of this statute, which was amended in December, 1952, has been recently decided in the Northern District of California, Northern Division.

The appropriate sections of said statute which were before the Northern Court on that occasion have not been modified by amendment.

United States of America v. Josefa Holquin de Cadena, et al., No. 10728, which interpreted the same statute as involved in the present case, and which declared such statute unconstitutional for ambiguity and indefiniteness. To quote in some respects from said decision which was decided by Judge Oliver J. Carter on June 6, 1952, who in declaring the act unconstitutional, wrote a Memorandum of Opinion explaining his reasons therefor, of which the following language is quoted in part:

“Ambiguities are not to be resolved so as to embrace offenses not clearly within the law. *Krickman v. United States*, 256 U. S. 363, 367. The words of a criminal statute must be such as to leave no reasonable doubt as to the intention of the Legislature, and where such doubt exists the liberty of the defendant is favored. (*United States v. Corbett*, 215 U. S. 233.)

“This court is mindful that the amendment to the statute here considered was prompted in part to remedy defects pointed out by the judiciary.

“The provisions of Paragraph (2), however, are new to the statute and were not adopted to cure the disclosed defect. Consequently, it is not now decided that any of the numbered paragraphs of subsection (a), other than Paragraph (2), are so uncertain as to be void.

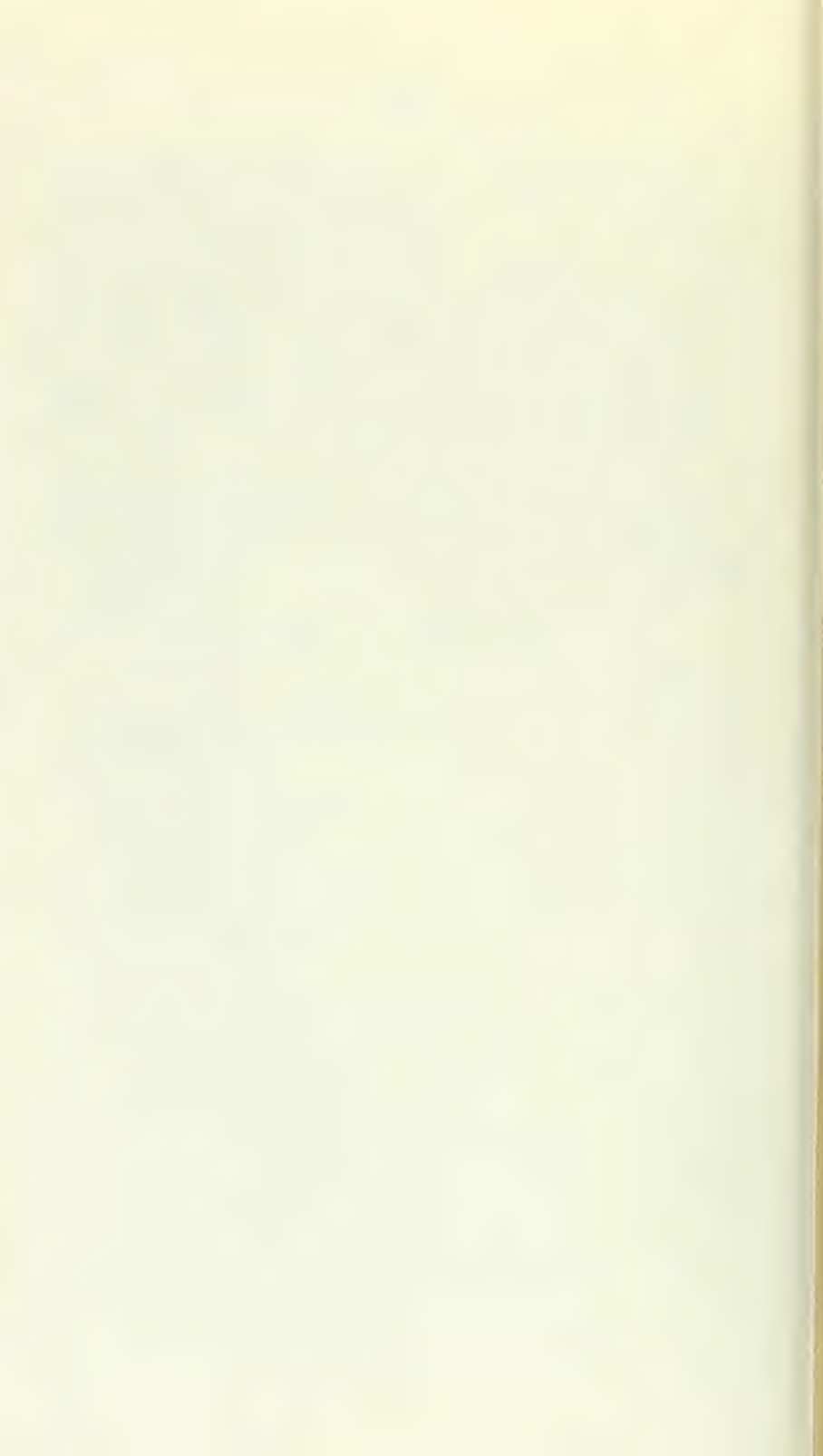
“But, paragraph (2), whether read alone, or in conjunction with paragraph (4), lacks sufficient certainty to meet the requirements of due process of the Fifth Amendment. It is not for the courts to resolve this uncertainty. It is better for Congress, and more in accord with its function, to revise the statute than for the courts to guess at the revision it would make. *United States v. Evans, supra.*”

For the foregoing reasons, it is accordingly urged that the judgment of conviction be reversed and that such order be made as is just and proper in the premises.

Respectfully submitted,

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Attorney for Appellant.



No. 14065

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNESTO MARTINEZ-QUIROZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

FILED

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No. 14065

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ERNESTO MARTINEZ-QUIROZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

Statement of Jurisdiction.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on April 8, 1953, of three counts under Section 1324(a)(2) of Title 8, United States Code.

On April 17, 1953, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on June 2, 1953. On May 25, appellant filed a Motion to Dismiss. On June 3, appellant filed a writter Waiver of Jury.

On June 3, trial without a jury was commenced and on June 4, the Court denied appellant's motion to dismiss the indictment and the Court sitting without a jury finds

the appellant guilty of Count Three as charged in the indictment, Counts One and Two having been previously dismissed.

On June 4, 1953, appellant was sentenced to imprisonment for a period of six months and appellant was fined \$750.00. Sentence was suspended on the sentence of six months' imprisonment only and the appellant was placed on probation for a period of three years.

The District Court had jurisdiction of this Cause of Action under Section 1324(a)(2) of Title 8, United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction of the appeal under Section 1291 of Title 28, United States Code.

II.

Statutes Involved.

The indictment in this case was brought under Section 1324(a)(2) of Title 8, United States Code.

The indictment charges a violation of Section 1324(a)(2), which provides in its pertinent part:

“Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who . . . knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law; . . . any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under

the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.”

III.

Statement of the Case.

Count Three of the indictment charges as follows:

“Count Three.

(U. S. C., Title 8, Sec. 1324(a)(2)

“On or about March 11, 1953, in Imperial County, California, within the Southern Division of the Southern District of California, defendants THOMAS GENE DOTY and ERNESTO MARTINEZ-QUIROZ, knowing that an alien, namely: Enedina Rodriguez vda. de Arivizo, was then in the United States in violation of law and having reasonable grounds to believe that said alien’s entry into the United States occurred less than three years prior to the aforesaid date, did transport and move and attempt to transport and move said alien within the United States, in furtherance of such violation of law.”

On April 17, 1953, appellant appeared for arraignment and plea, represented by J. B. Mandel, Esquire, before the Honorable Jacob Weinberger, United States District Judge, and entered a plea of Not Guilty to the offenses charged in the indictment.

On May 25, 1953, appellant filed a Motion to Dismiss, On June 3, 1953, the appellant having filed a written Waiver of Jury proceeded to trial and on June 4, 1953, the Court denied appellant's Motion to Dismiss and upon completion of the trial by the Court, the Court found the appellant guilty of Count Three of the indictment.

On June 4, 1953, the Court sentenced appellant to imprisonment for a period of six months and fined appellant \$750.00. The sentence of six months' imprisonment was suspended and appellant was placed on probation for a period of three years.

Appellant assigns an error the Judgment of Conviction on the following grounds:

- (1) That the District Court erred in finding the appellant guilty for the reason that the Government produced insufficient evidence to establish appellant's guilt beyond a reasonable doubt.
- (2) That the District Court erred in not sustaining appellant's Motion to Dismiss the indictment on the ground that the judgment by the Court was against the law in that Title 8, United States Code, Section 1324(a)(2) was and now is unconstitutional and is in violation of the Fifth Amendment of the Constitution of the United States.

IV.

Statement of Facts.

Appellee suggests the following as the record of this case: On or about March 10, 1953, defendant Ernesto Martinez-Quiroz came to Brawley, California. He states that his reason for coming to Imperial Valley was for the purchase of hay. It is noted, however, that in his own testimony he admits he is in the business of conducting a gasoline station and tavern in San Fernando, California. He did not indicate the use to which he intended for the hay. Upon arriving at Brawley, the defendant went to the Mexican area and frequented at least one bar, where he met the alien Maria Margarita Ortiz who in turn introduced him to the alien Enedina Rodriguez vda. de Arivizo, named in Count Three of the indictment. The defendant and the two above aliens agreed that he would employ them in his establishment in San Fernando, California, and that he would arrange for their transportation from Brawley, California, to his establishment. The defendant drove the alien Maria Margarita Ortiz from a bar in Brawley where she was working to the house of the alien Enedina Rodriguez vda. de Arivizo in his car, picked up the latter and drove to a hotel in Brawley where all three entered a room registered to the defendant. The two women waited in a hotel room with two other aliens. The defendant Doty came to this particular room, whereupon the four aliens with Doty left, entered a car driven by Doty and proceeded north toward San Fernando on U. S. Highway 99 until all five persons were apprehended in San Bernardino, California. Defendant Martinez, before the aliens left Brawley on March 10, 1953, took a valise from the witness Maria Margarita Ortiz; defendant informing her he would take it to his

home in San Fernando, which valise was found by immigration officers subsequently in defendant Martinez' home in San Fernando.

The two alien women referred to above stated the defendant Martinez knew they were recent arrivals from Mexico, illegally in the United States and did not possess the proper papers. The defendant Doty although he did not identify the defendant Martinez stated the instructions he, Doty, received were to pick up four aliens including Enedina Rodriguez vda. de Arivizo in a hotel room registered to a man named Martinez.

V.

Argument.

A. The Statute Under Which the Appellant Was Convicted Is Constitutional and Not Void for Vagueness.

For a further citation covering the point urged on appeal by appellant, the appellee cites the recent case of *Faustino Herrera v. United States of America*, U. S. Court of Appeals for the 9th Circuit, No. 13733, dated November 19, 1953, in which the Court said:

"While the verbal arrangement of the Statute (1324(a)(2)) may be thought awkward, we are of the opinion that a reading of it as a whole in the light of congressional declaration of purpose leaves no rational doubt as to what was intended . . . Thus, it is manifest that the 'he' and 'his' of paragraph two refer to the phrase 'any alien,' which finally shows up in paragraph four after the several prohibited activities in respect of the alien have been specified."

The following excerpts from the Government's brief in the above cited case are believed to be applicable herein and are again urged by the appellee.

The constitutionality of a statute is the strongest presumption known to the Court.

United States v. Brewer, 139 U. S. 278.

The test of a "void for vagueness" doctrine is whether a statute is so vague and indefinite that it does not convey a sufficiently definite warning as to the prescribed conduct when measured by common understanding and practice.

Jordan v. DeGeorge, 341 U. S. 223;

Connally v. General Construction Co., 269 U. S. 385;

Dennis v. United States, 341 U. S. 494;

Winters v. New York, 333 U. S. 507;

Boyce Motor Lines v. United State, 342 U. S. 337.

In applying the test, it is proper for the Court to look into the entire text of the statute to inquire whether a statute is sufficiently explicit to inform those who are subject to it.

Connally v. General Construction Co., 269 U. S. 385;

American Communications Assn. v. Doud, 339 U. S. 382.

Where a statute requires that conduct be wilful or in bad faith, it relieves the statute of the objection that it punishes without warning an offense of which the accused was unaware.

Screws v. United States, 325 U. S. 91.

The fact that punishment is restricted to acts done with knowledge that they contravene the statute makes the objection of vagueness or indefiniteness untenable.

American Communication Assn. v. Doud, 339 U. S. 382;

United States v. Ragen, 314 U. S. 513;

Gorin v. United States, 312 U. S. 19;

Ommichevarria v. Idaho, 246 U. S. 343;

Dennis v. United States, 341 U. S. 494;

Boyce Motor Lines v. United States, 342 U. S. 337.

Where Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal, and has not altogether omitted the provision for penalty, every reasonable presumption attaches to the proscription to make it effective in accord with the evident purpose.

United States v. Evans, 333 U. S. 483;

United States v. Brown, 333 U. S. 18.

The particular acts charged against the appellant in the indictment are based upon the provisions of paragraph 2 of subsection (a) of Section 8, United States Code. Specifically the appellant was charged with the transportation and movement within the United States of certain named aliens, knowing that these said aliens were in the United States in violation of law and knowing or having reasonable grounds to believe that these said aliens' entry into the United States occurred less than three years prior to the date of their transportation. The appellant here contends that Title 8, 1324(a)(2), is unconstitutional in that said statute violates the due process clause of the Fifth Amendment of the Constitution of the

United States. More particularly, the basis of appellant's claim is that the statute under which the appellant was convicted is vague, indefinite, uncertain and unintelligible. His claim is the invalidity of the statute under the "void for vagueness" doctrine.

Public Law No. (8 U. S. C. 1324(a)(2)), under which the conviction was had, provides:

"AN ACT.

"To assist in preventing aliens from entering or remaining in the United States illegally.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8 of the Immigration Act of 1917 (39 Stat. 880; 8 U. S. C. 1324), is hereby amended to read:

"Sec. 8. (a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

"(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

"(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

"(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, har-

bor, or shield from detection, in any place, including any building or any means of transportation; or

“(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of any alien, including an alien seaman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

“(b) * * *

“Sec. 2. * * *.”

A simple reading of the entire statute clearly defines the offenses which Congress intended to include in its provisions. Subsection (a) defines the persons who are subject to the conduct which the statute seeks to prohibit. Paragraph (1) prohibits the smuggling of aliens into the United States. Paragraph (2), under which the appellant was convicted, prohibits the transportation of aliens within the United States, by one who knew the aliens were unlawfully in the United States and knew or had reason to believe the aliens' last entry occurred within three years prior to the transportation. Paragraph (3) prohibits the concealing, harboring, or shielding of aliens unlawfully in the United States, and Paragraph (4)

charges an offense against those who aid and abet in the smuggling of aliens into the United States.

Public Law 283, amending Section 1324 of Title 8, United States Code, was approved March 20, 1952. This amendment was enacted to

“overcome a deficiency in the present law making it an offense to harbor or conceal aliens who have entered this Country illegally, and to strengthen the law generally in preventing aliens from entering or remaining in the United States illegally.” (Emphasis added.) H/R. Rep. No. 1377, 82nd Cong., 2d Sess.; see also *United States v. Evans*, 333 U. S. 483.)

In the *Evans* case, *supra*, the Court held that Title 8, Section 1324 contained no penalty provision for a person convicted of harboring or concealing an alien illegally in the United States. To obviate this defect, Congress enacted Public Law 283. The penalty provision added to Section 1324, as amended, is stated at the conclusion of Paragraph (4) of subsection (a). No separate penalty provision is provided for a violation of each of the other three offenses defined in subsection (a) and, therefore, it is obvious Congress intended that the smuggler, transporter, harborer or concealer, and the aider and abetter, be subject to the same punishment. This becomes more evident upon a reading of the penalty section which provides in its pertinent part:

“ . . . shall be punished by a fine . . . or by imprisonment . . . for each alien in respect to whom any violation of this subsection occurs.” (Emphasis added.)

“this subsection” referring to subsection (a) of Section 144, Title 8, United States Code, in its entirety.

The intent and purpose of Congress in the enactment of the statute under attack here renders its reading logically clear, and, contrary to the position taken by the appellant, satisfies the requirement of the Fifth Amendment of due process of law. A construction of this statute, consistent with the manifest intent of Congress, makes the statute clearly definable in terms of what acts are forbidden and which are not, to men of common intelligence and understanding.

It is further contended by the appellant that Paragraph (2) of Title 8, Section 1324(a), cannot be reduced to one certain meaning because of the phrase, "knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto." The defect is said to be that the pronouns "he" and "his" as used in the above-quoted phrase have no clear reference to any antecedent word. As authority for this position appellant cites *United States v. De Cadena*, 105 Fed. Supp. 202. The Court in the *De Cadena* case, *supra*, says at page 207:

"This portion of the statute is susceptible of two radically different interpretations, depending upon the determination of whether these words refer to 'any person' or 'any alien.' The sequence of words used in the statute indicates that 'he' and 'his' refer to 'any person' and not to 'any alien.'"

The statute as proposed to be interpreted by Judge Carter in the *De Cadena* case, *supra*, would then read:

"(a) Ony person . . .

(2) knowing that (he) any person is in the United States in violation of law, and knowing or having

reasonable grounds to believe that (his) any person's last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) . . .

(4) . . . shall be guilty of a felony, and upon conviction thereof shall be punished by a fine . . . or by imprisonment . . . for each alien in respect to whom any violation of this subsection occurs: . . .” (Emphasis added.)

This interpretation requires as a necessary element of the offense that both the transporter and the alien be unlawfully in the United States. It would exempt any citizen of the United States from the proscription of transporting aliens illegally in the United States. This would be clearly inconsistent with the manifest congressional intent in enacting Public Law 283. That intent was to broaden the scope of this section, not to narrow its operation. This construction is incongruous when it is remembered that the “any person” used in subsection (a) refers to both aliens and non-alien. The reference in the penalty section to “Each alien in respect to whom any violation of this subsection occurs” makes it obvious to men of common intelligence and understanding that the pronouns “he” and “his” used in Paragraph (2) must refer to “any alien” and “any aliens.”

It is submitted that the words “he” and “his,” as used in Paragraph (2), should be read as referring to the “any alien, including an alien seaman,” used in Paragraph (4). This position is strengthened when the statute is read in its entirety. The statute is entitled “An Act

to assist in preventing aliens from entering or remaining in the United States illegally” (emphasis added). The Government’s interpretation would obviate the necessity of both the transporter and the alien being in the United States illegally.

Accordingly, it is submitted that Paragraph (2) should be construed to read as follows:

“Any person knowing that he (the alien) is in the United States in violation of law, and knowing or having reasonable grounds to believe that his (the alien’s) last entry into the United States occurred less than three years prior thereto, transports or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law, any alien, including an alien seaman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony”

This, it is submitted, is the interpretation that must be placed upon this section by men of common intelligence and understanding. No other is consistent with the manifest intent of Congress in enacting Public Law 283. Such an interpretation makes the statute sufficiently certain to satisfy the requirements of the due process clause of the Fifth Amendment. Therefore appellant’s motion for new trial was properly denied by the trial court.

B. The Statute Does Not Constitute Arbitrary Class Legislation.

The Fifth Amendment of the Constitution does not by its terms provide for equal protection of the law. *Currin v. Wallace*, 306 U. S. 1. The application of this clause to the Federal Government is limited to such discriminatory legislation by Congress as amounts to a denial of due process of law. *Hirabayashi v. United States*, 320 U. S. 81.

Appellant contends that the provision of Section 1324 (a)(4), Title 8, United States Code, exempting persons employing aliens illegally in the United States establishes an unconstitutional preferred class and as such is within the proscription of the Fifth Amendment. He bases his contention on the ground that Paragraphs (2) and (4) must be read together since no one paragraph constitutes an independent sentence. Paragraph (4) provides in its pertinent part:

“ . . . Provided however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.”

There is no general rule by which to distinguish reasonable and lawful from unreasonable and arbitrary classification. The Court in *Pfeiffer Brewing Co. v. Bowles*, 146 F. 2d 1006, cert. den. 324 U. S. 865, at 1007, said:

“Class legislation discriminating against some and favoring others is prohibitive. But the rule does not prohibit or prevent classification which is reasonable, for, while the law must affect alike all persons in the same class and under similar conditions, classification

based upon substantial distinction, with a proper relation to the objects classified and the purposes sought to be achieved, if it does operate alike on all members of the class is not special, discriminatory or class legislation . . . But if the statute is uniform in the obligation of all members of a legitimate class, to which it is made applicable, no one can complain of denial of equal protection of the laws."

The question then is whether employers as distinguished from non-employers compose a legitimate class. The problem is one of consideration of the general policy underlying the legislation. Statutes prohibiting harboring are generally enacted as an aid to the detection and apprehension of those law violators it would otherwise be impossible to find. Certainly when that policy is considered in connection with the harboring of aliens illegally in the United States it becomes obvious that employers can reasonably be placed in a distinct class. Generally the employers involved are those engaged in agricultural endeavors. Their needs are for large numbers of persons within certain short specified periods of time. In many cases employers do not see their employees. They are hired through labor contractors. To impose upon employers the burden of determining the status of each employee would be unreasonable. Further, these large concentrations of individuals do not hinder detection. The evil attempted to be corrected by harboring statutes is not present in these cases. The classification therefore should be upheld as reasonable and legal.

Assuming that the classification created by Paragraph (4) were unreasonable, it cannot be said that this exemption does necessarily apply to the transporter of aliens illegally in the United States.

Paragraph (4) of Section 1324(a), Title 8, United States Code, is limited in its application by this language:

“shall not be deemed to constitute harboring.” (Emphasis added.)

It cannot in this respect be said to be applicable to the conduct proscribed by Paragraph (2) that of transporting aliens illegally in the United States. This would be indicated by an analysis of the definition of the words “harbor” and “transport.”

Webster's New International Dictionary, Second Edition, Unabridged, defines “harbor” as:

“ . . . 1. To afford lodging to; to entertain as a guest; to shelter; to receive; to give refuge to; to contain; to indulge or cherish a thought or feeling;—now usually with reference to an evil, esp. unlawful, act or intent.”

The same source defines “transport” as:

“ . . . 1. To convey; esp., to carry or convey from one place or station to another, as by boat or rail; to transfer; as to transport goods or troops.”

Appellant contends that “one of the incidents of employment may be transportation, which in turn might constitute harboring.” It can be argued that transportation of an alien illegally in the United States may in some situations also result in harboring. However, the exemption of employers as limited in Paragraph (4) does not by its terms extend to the proscription of transportation of aliens illegally in the United States of Paragraph (2).

Assuming, without conceding, the exemption is an unreasonable classification, such invalidity does not affect

Paragraph (2) in its application to transporters of aliens illegally in the United States. Paragraph (2) is independent of Paragraph (4) and may stand while the provisions concerning harboring are stricter. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282. This may be done even though the constitutional and unconstitutional portions of the statute are in the same section. *Berea College v. Kentucky*, 211 U. S. 45.

It is submitted therefore that Paragraph (2) of Section 1324(a), Title 8, United States Code, does not create an unreasonable classification and is constitutional.

Appellant further contends that the provision of Paragraph (2) relating to the transportation of an alien whose last entry into the United States occurred less than three years prior thereto is arbitrary and capricious. He contends that there is no relation between the establishment of an arbitrary three-year period of illegal residence and the object sought to be attained by the Act.

Basically we must begin with the presumption that statutes enacted by Congress are constitutional. *United States v. Brewer*, 139 U. S. 278. In the case of *N. L. R. B. v. Edward G. Budd Mfg. Co.* (6th Cir.), 169 F. 2d 571, cert. den. 335 U. S. 908, the Court says at page 577:

“It is well recognized that discriminatory legislation may be so arbitrary as to violate the due process clause of the Fifth Amendment. *Nichols v. Coolidge*, 274 U. S. 531, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081; *Minski v. United States*, 6 Cir., 631 F. 2d 614, cert. den. 319 U. S. 775, 63 S. Ct. 1431, 87 L. Ed. 1722 (ruling affirmed 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519). It is equally well recognized that Congress has broad discretion in making statutory classifications, that such a classification is not invalid if it bears a reasonable rela-

tion to the purpose of the legislation, that legislative classification is presumed to rest on a rational basis if there is any conceivable state of facts which would support it, and that the courts will not inquire into the necessity of such classification if it is not patently irrational and unjustifiable.”

McCulloch v. Mayland, 4 Wheat. 316, 422, 4 L. Ed. 579;

Carmichael v. Southern Coal & Coke Company, 301 U. S. 495, 509, 513, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A. L. R. 1327;

Charles L. Steward Machine Co. v. Davis, 301 U. S. 548, 584, 585, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293;

Helvering v. Davis, 301 U. S. 619, 646, 672, 57 S. Ct. 904, 81 L. Ed. 1307, 109 A. L. R. 1319.

Certainly, as argued by appellant, Congress could regulate and prohibit the transportation of all aliens illegally in the United States. This without regard to tone of residence. Could they not then limit the risk imposed upon those who would transport aliens illegally in the United States by defining the necessary knowledge or reasonable belief of the transporter? Such a self-imposed limitation upon the power to legislate against the transportation of aliens illegally in the United States is not such a patent irrational and unjustifiable classification as would make it repugnant to the due process clause of the Fifth Amendment. It might be better expressed in the words of the Supreme Court in the case of *United States v. Petrillo*, 332 U. S. 1, where the Court says at page 8:

“But it is not within our province to say that because Congress has prohibited some practices within its power to prohibit it must prohibit all within its power.”

VI.

The Court Did Not Err in Finding the Defendant Guilty of Count Three of the Indictment.

The Court did not err in finding the defendant guilty of Count Three of the indictment. The trial court, Judge Weinberger presiding, having dismissed Counts One and Two of the indictment, the Court did not err in finding the defendant guilty of Count Three as charged.

In reading the entire testimony the Government does not rely upon the testimony of the co-defendant Doty but relies upon the testimony of the two Government witnesses who testified to the arrangements with the defendant Martinez and to the finding of one of the witnesses suitcases in Martinez' home.

Thus, the witness, MARIA MARGARITA ORTIZ, testified as follows:

"The Clerk: What is your name?

The Witness: Maria Margarita—

Mr. Sankary: Counsel has stipulated—

The Court: Is she the one that is named in Count 3?

Mr. Sankary: No, she is not, your Honor.

The Court: All right.

Mr. Sankary: Counsel has stipulated, your Honor, that the two women who were called for the Government to testify are Mexican aliens and that they came into the country illegally at the time of their entry into the United States.

Mr. Mandel: I presume they are aliens, but I do not want to admit the rest of it.

Mr. Sankary: Oh, pardon me.

The Court: All right.

Direct Examination.

By Mr. Sankary:

Q. Where do you live? A. In Mexicali.

Q. Of what country are you a citizen? A. Of Mexico.

Q. When did you come into the United States last? A. You mean, the last time?

The Court: Speak loudly so everybody can hear you, even though it is in Spanish.

The Witness: It was ten days before I was apprehended.

Q. By Mr. Sankary: That would be in about February of 1953? A. Yes, in February.

Q. Were you inspected by an Immigration officer when you came in? A. No.

Q. How did you get in?

Mr. Mandel: Will you keep your voice up? I can't hear anything she says. I understand Spanish, and I would like to hear her.

The Court: Can you sit on the other side, nearer to her? You can do that if you want to.

(To the Interpreter) Will you instruct the witness to talk louder, Mr. Marcelli. If you will stand back a little further she will have to talk louder.

The Witness: I crossed the line through Mexicali.

Q. By Mr. Sankary: Did you jump the line? A. Yes.

Q. With somebody else, or by yourself? A. All by myself.

Q. Where did you go? A. To Brawley.

Q. Do you know the defendant, Ernesto Martinez? A. No; I met him in Brawley.

Q. When did you meet him in Brawley? Was it on or about March 10, 1953? A. Yes.

Q. And where did you first see him? A. It was that day that he came to the cantina.

Q. Do you know the name of the cantina? A. El Cafetal.

Q. And did you talk to Mr. Martinez? A. Yes.

Q. And what did you talk about? A. That he was going to take me to San Fernando.

Q. And what were you to do in San Fernando? A. Well, he told me that I was to go to work in his cantina, that he had a cantina there.

Q. Was he to pay you? A. I think he was going to pay me \$40.

Q. Did he tell you how he was going to get you there? A. Yes, he told me.

Q. How? A. Well, with a kioti.

Q. That is, a smuggler—

Mr. Mandel (interposing): The Court cannot take judicial notice of what that means.

Q. By Mr. Sankary: What do you mean by a 'kioti'? A. With the gentleman who brought us.

Q. Now, did you tell Mr. Martinez how long you had been in the United States? A. You mean, if I told him?

Q. Yes. A. Yes.

Q. How long did you tell him you were in the United States? A. I told him that I have been here 15 days, and that I had come from Mexicali.

Q. Now, did you tell him that you were afraid of the Immigration officers?

Mr. Mandel: Just a minute, if your Honor please. That is putting words in the mouth of this witness; I object to that as leading and suggestive.

The Court: It is leading.

Mr. Mandel: He can ask for the conversation without putting words in the witness' mouth; counsel knows as well as I know that is a leading question.

The Court: In some instances we do allow leading questions to these witnesses who are not familiar with our courts and our customs, although you shouldn't begin with leading questions.

Mr. Sankary: I am just trying to save some time because I know what is going to happen next.

Q. Did you talk to him about Immigration officers?

The Interpreter: I must repeat the question.

(Question interpreted.)

The Witness: I do not understand.

The Court: All right; go ahead and ask a leading question.

Q. By Mr. Sankary: Did you tell Mr. Martinez that you were afraid of being picked up by the Immigration officers? A. Yes, I told him so.

Q. What did he say to you? A. He did not say much about that, he told me not to be afraid.

Q. Did you say anything else? A. No.

Q. Now, did he tell you how much it would cost you to make the trip to San Fernando? A. Yes.

Q. How much? A. 50.

Q. Were you to go to San Fernando by yourself, or with somebody else? A. With the young girl who is sitting back there (indicating), the two of us.

Q. What were the arrangements that you made with Mr. Martinez to go to San Fernando? A. Arrangements?

Q. Yes. What agreement? What were you supposed to do? A. Only to go to work there at the cantina.

Q. Did Mr. Martinez tell you where to meet him, to pick you up so that you could go to San Fernando?

A. No, the gentleman who was taking me, he was to take me to his home.

Q. Well, after you talked to Mr. Martinez that morning, did you go right away in a car to San Fernando? A. That was Wednesday evening.

The Court: I understand there was some other gentleman that was going to take you—is that what you are saying?

The Witness: The same one who was to take the four of us; there were four of us.

Mr. Sankary: Maybe I can clear it up, your Honor.

The Court: Yes.

Q. By Mr. Sankary: Was that the driver of the car, the man that is standing up—

(To Mr. Doty) Mr. Doty, will you stand up.

(Man rises in courtroom.)

The Witness: Yes.

Q. By Mr. Sankary: And how many were in the car with you? A. There were two of us girls, and two boys.

Q. Now, where were you supposed to meet the man who was supposed to take you, Mr. Doty? A. Well, he went to pick us up where we were.

Q. Did Mr. Martinez tell you where he was to pick you up?

Mr. Mandel: If your Honor please, I feel that that type of a question—although I appreciate the fact that certain leading questions are admissible—

The Court: A little louder, please.

Mr. Mandel: I say, even though it may be permissible sometimes to expedite matters to have wit-

nesses of this character questioned with leading questions, nevertheless I felt that the question as now framed would be highly improper, and for that reason I feel it should not be asked the witness.

The Court: What was the question?

Mr. Sankary: I asked: 'Did Mr. Martinez tell you where to meet the man?'

The Court: Ask what he said to her about meeting her.

Q. By Mr. Sankary: Did Mr. Martinez say anything to you about meeting the man that was to take you? A. No—I don't know, maybe he arranged—

Mr. Mandel: I submit, if your Honor please, that should be stricken.

Mr. Sankary: That may be stricken.

Q. Did you see Mr. Martinez again? A. No.

Q. Didn't you see him later that evening? A. No, after we left in the car I did not see him again.

Q. Before you left in the car, did you see Mr. Martinez again? A. No. Well, in the hotel where the gentleman went to pick us up, but after that I did not see him again.

Q. Before you left did Mr. Martinez give you a ride again? A. Well, we went to pick up that girl from her home, at her home.

Q. Tell us what happened. Did Mr. Martinez take you—tell us everything that happened. A. If you mean to pick up the girl, yes. He took me in his car.

Q. What happened after you got to the girl's house? A. Well, we went to get her, and from there we went to the hotel.

Q. Did Mr. Martinez take you? A. Yes, and we were there at the hotel, the four of us, when the gentleman over here picked us up.

Q. Now, did Mr. Martinez say anything to you while you were at the hotel waiting for the man to come? A. No.

Q. Did you have any clothes with you? A. The suitcase that is there (indicating).

Q. And who was supposed to take the suitcase that is there? A. Well, he said that he was going to take it in his car.

Q. Who said it? A. Martinez, the gentleman over there (indicating).

Q. When did he tell you that he was going to take this in his car? A. The day that we left there.

Q. And where did he tell you he was going to take it? A. He said he was going to take it to his home.

Q. In San Fernando? A. Yes.

Q. And did he take your suitcase? A. I don't know, because I did not see my suitcase again.

Q. Did you give your suitcase to him? A. No.

Q. Well, where did you leave your suitcase? A. Well, maybe he sent it; I don't know how it was.

Mr. Mandel: Just a moment, please. May I ask that be stricken, if your Honor please?

The Court: Well, that is not—that is objectionable.

Q. By Mr. Sankary: When you got in the car with the man that was to take you, did you give your suitcase to Mr. Martinez?

Mr. Mandel: That has been asked and answered, if your Honor please.

The Court: Well, she may answer again.

The Witness: No, when we arrived at the home, or the house where I had the suitcase, it was there that we put it in his car.

Q. By Mr. Sankary: Oh, you put it in Mr. Martinez' car? A. Well, he said that he was going to bring it, and that is why we put it in the car.

The Court: You are talking about Martinez, when?

The Witness: Yes, Mr. Martinez.

The Court: And that was at the home where he took you, is that it?

The Witness: Yes, and from there we went to the hotel, and the suitcase was left in his car.

Q. By Mr. Sankary: Now, you said that he told you it would cost \$50 to make the trip from Brawley to San Fernando. How were you supposed to pay that \$50? A. Well, we weren't to pay; we were to work for him.

Q. From whom? A. And Mr. Martinez was to pay for us.

Mr. Sankary: At this time, your Honor, I would like to have this marked as Government's Exhibit No. 1 for identification, and I will use it later for that purpose. And when I say 'this,' I am referring now to the suitcase—for the record.

I have no further questions.

(Whereupon the document was received and marked as Government's Exhibit No. 1 in evidence.)

The Court: Cross-examine.

Cross-examination

By Mr. Mandel:

Q. You stated when you were questioned, when the Government's attorney asked you when you came into the United States, I believe you said 'the last time.' What do you mean by that?

Mr. Sankary: If counsel is trying to get in the fact that she has been in the United States before, I will so stipulate.

Mr. Mandel: Well, I want it in the record.

The Court: Well, she said she came in about a month preceding this.

Q. By Mr. Mandel: Did you come into the United States before that? A. No, that was the first time.

Q. You mean, in Brawley; but were you any other place in the United States before there? A. No, only there in Brawley.

Q. Well, then, when you said 'the last time,' what did you mean by that? A. That was when this gentleman asked me when I had crossed.

Q. And you came into the United States alone, I take it, is that it? A. To Brawley, yes.

Q. Well, was there any other place that you went to other than Brawley? A. No, only to Brawley.

Q. All right. And do you remember when it was in February that you came to Brawley? A. If you mean the date, I don't remember.

Q. Where was the first place you went to work when you were in Brawley? A. I didn't work anywhere else except at the cantina.

Q. Well, when was it you went to work there? A. When I had been there over 15 days.

Q. All right; who was the proprietor of the El Cafetal? A. His name is Don Pepi.

Q. Is that the only name you know him by? A. Yes.

Q. Does he have the name of Mares? A. I don't know his name.

Q. Now, did you tell him that you had just come in from Mexico?

The Court: Tell who?

Mr. Mandel: Mr. Pepi, or whoever it was.

The Court: Well, are we interested in that?

Mr. Mandel: Well, it is preliminary to the defense, if the Court please, the woman was working—

The Court: This is not in connection with this enterprise.

Mr. Mandel: That is true, but I thought it might have some value, her working there, and what somebody might have presumed—what somebody was led to presume, to believe.

The Court: Go ahead.

Q. By Mr. Mandel: Did you tell him you had just come from Mexico? A. Yes.

Q. Did you tell him you came in illegally? A. Yes, I told him.

Q. But you were not sent out; you still worked there, is that it? A. Yes, sir.

Q. And you worked there for 15 days, did you? A. Yes.

Q. And you were working there at the time that Mr. Martinez made his appearance in your place; is that it? A. Sir?

Q. And you were working there at the time that Mr. Martinez came to the cantina? A. Yes, he arrived at the cantina.

Q. Were you the only waitress who was working there at the time he came in? A. I was there, and another girl.

Q. And were you serving drinks? I mean by that, hard drinks? A. No. Beer.

Q. And did you serve Mr. Martinez beer? A. Yes.

Q. How many beers did you serve him? A. I do not remember.

Q. Were there many? A. No.

Q. Well, can you give me an idea of approximately how many there were? A. No, I do not remember.

Q. Did you ever see Martinez in your life before this time that he appeared in your cafe? A. No, I did not know him.

Q. Well, when you were talking with him while you were serving him the beer, you entered into a general conversation about what you were doing, and so forth, is that right? A. Yes.

Q. Did he tell you that he had a business in San Fernando, a gas station and also a cantina, did he tell you that? A. No, he only mentioned the cantina.

Q. And did he tell you about any of his children that he had, or anything of that sort? A. Yes, he told me that he had a wife.

Q. Did he tell you that he had some children, too? A. Yes.

Q. How many did he say he had? A. He did not say how many.

Q. Did you tell him, in the course of the conversation did you tell him how much wages you were getting at this cafe? A. Yes, I told him.

Q. And then did he say, 'Well, that is a very small sum for a waitress; you can get more than that in Los Angeles or in San Fernando.' Did he say that to you? A. In San Fernando, yes.

Q. And he told you if you ever were going to leave to go to Los Angeles, or San Fernando, he would be glad to have you there, and he would be able to pay you more than the amount you were getting; is that true? A. Yes, he said he would pay 40.

Q. He didn't say any particular time when you should go there, did he? A. Well, it was on a Monday that I met him, and that was Tuesday, and we left Brawley on Wednesday.

Q. Well, he didn't go with you, did he? A. No, he was there at the cantina.

Q. I know, but I mean, the time you were going to go away? A. Well, he was there until we left with the other gentleman, then we didn't see him again.

Q. Do you mean Mr. Doty, who stood up there? A. Yes.

Q. Did Mr. Doty talk to Mr. Martinez in your presence? A. Yes.

Q. Did they talk to each other? Did they? A. Yes, the two of them talked.

Q. You are sure of that now? A. Yes, I saw them when they talked.

Q. That is right with you and this other lady in the same room, and they were discussing, is that it? A. Yes.

Q. Did you know this young lady who went with you and with Mr. Doty before this occasion? A. No, I did not know her; I met her that day right there.

Q. Do you know where she was working? A. No.

Q. Besides telling you about the work in the cantina, was anything else said about any other type of work—I am speaking now about Mr. Martinez? A. No. He only mentioned that work.

Q. He didn't say anything about any ranch work? A. No.

Q. Did Mr. Martinez speak to Mr. Doty in English or in Spanish? A. English.

Q. You don't understand English, of course? A. I do not.

Q. You didn't understand what they were saying; is that it? A. That is correct; I did not understand.

Q. Did Mr. Martinez, in the course of the conversation that he had with you, mention—in which he told you, as you testified, that he offered you a job at higher wages, did he in the conversation ask you if you had a Social Security card? A. No, he did not ask me that.

Q. You are sure, now, that you told Mr. Martinez that you were just from Mexico and that you were here illegally? A. Yes.

Q. Who was present when you said that, besides you and Martinez? A. There were just the two of us there.

Q. Where was the proprietor, was he there? A. He was not there.

Q. Was the other waitress there at the time that you mentioned? A. No, I was there by myself.

Q. Were there any patrons in the restaurant or in the cafe? A. No.

Q. Just you and him in the cafe alone?

The Court: She has already said so; I don't know that you need pursue it unless you have some other reason—

Mr. Mandel: All right, your Honor.

Q. What time was it that he was in the cafe? A. Well, he was there to eat; he went there to eat.

Q. He sat there and he also drank, did he? A. Yes.

Q. And was that the only occasion that he was in the restaurant? A. Well, on the Wednesday, yes, when we left there.

Q. You say you saw him on a Monday; is that right? A. Well, on Monday, Tuesday and Wednesday, the three days, because I left work on Wednesday.

Q. Did you work on Tuesday, also? A. Yes.

Q. Was he there on Tuesday, eating in the cafe? A. Yes, Tuesday and Wednesday.

Q. You mean, he ate there in your restaurant Monday, Tuesday and Wednesday, every day; is that it? A. Yes.

Q. Then it wasn't just on one occasion he was in the restaurant? A. Well, the three days that he was there he went to eat there.

Q. All right. And during the time that he went, did you serve him each time that he came there? A. No, the owner did also, the patrone.

Q. Well, this conversation you related about him offering the job, was that on Monday, Tuesday or Wednesday? A. That was on Tuesday.

Q. And Wednesday he came back and ate again in your place, after he offered you the job; is that it? A. Yes.

Q. Did you have any conversation with him at that time? A. Yes, on Wednesday.

Q. What was the conversation in the restaurant at that time? A. Well, on the trip, how he was going to do it.

Q. What did he say? A. You mean, what he said?

Q. That is right. A. He said that he was going to arrange as to with whom we should come up.

Q. Was anything else said at that time? A. I don't remember, but I remember that.

Q. What time was this conversation? A. About 2:00 o'clock in the afternoon.

Q. Did you see him any more that day? A. Yes.

Q. At what time? A. After he went to get that other girl he came back.

Q. Did you go with him to get the other girl? A. No.

Q. And you don't know how that other girl came, then? A. He brought her.

Q. But you did not see him go to her house? A. No, I did not see him.

Q. You don't know how the suitcase was sent to San Fernando, do you? A. No, I don't know, because it was left in the car, so I don't know how it got there.

Q. Mr. Martinez did not give you any money, nor did you give him any money; is that right? A. That is right.

Q. Did you live at 1068 F Street, Brawley, before you were arrested? A. 1068?

Q. Yes, 1068? A. F?

Q. F Street, yes. A. No.

Q. Is this your valise? A. Yes, that is my suitcase.

Q. Do you know who sent that valise to Mr. Martinez? A. No, I do not know.

Q. And did you give us all the conversation you had with Mr. Martinez on Tuesday relative to getting a job in San Fernando? A. You mean, how the conversation was?

Q. Yes. A. Well, he arrived there and he asked me if I worked, and I told him, 'Yes,' and he asked me how much they paid me—

Q. I know; in addition to that was there anything said in connection with who you had worked for besides the man you were then working for? A. No, I don't now remember that.

Q. Well, there was quite a bit of conversation about various things, was there not, besides the fact of your getting a job in San Fernando; wasn't that true? A. No, only about that.

Q. Did Mr. Martinez tell you that was the first time he ever was in Brawley? A. Yes.

Q. Did he also tell you that he was not acquainted with the city, that if you knew of any places where he could stay—did he ask you about that? A. No, I don't remember that.

Q. Did he always drink beer with his meals when he was at the cafe?

The Court: Oh, why go into all those matters?

Mr. Mandel: I am almost through, your Honor.

The Court: That won't help us at all.

The Witness: Yes.

Mr. Mandel: That is all.

Mr. Sankary: No questions, your Honor. She may—(Witness leaves stand.)

Mr. Sankary: May I call the next witness, your Honor?"

And ENEDINA RODRIGUEZ SANCIONE testified as follows:

“The Clerk: What is your name, please?

The Witness: Enedina Rodriguez Sancione.

Direct Examination

By Mr. Sankary:

Q. Of what country are you a citizen. A. Of Mexico.

Q. When did you last come into the United States? A. I came in on March the 9th.

Q. 1953? A. Yes.

Q. And how did you come in, legally or illegally? A. Illegally.

Q. Then you were not inspected by an Immigration officer? A. I was not.

Q. And you had no papers to come into the United States? A. I had nothing.

Q. Did you jump the line? A. Yes.

Q. Do you know the defendant Martinez, who sits at the table here? A. Yes, sir, I know him.

Q. Where did you first see him? A. In a cantina where I was working, in Brawley.

Q. And what was the name of that cantina? A. La Copa de Ora.

Q. And did you talk to Mr. Martinez when he came in the cantina? A. Yes, sir.

Q. What did he talk to you about? A. Well, there was a friend of mine there, and she called me and told me, ‘Look, you going to go up there, don’t you?’ and I said ‘Yes,’ and ‘Well, this gentleman is looking for people who want to go up there.’

Q. And what did he say to you? A. He asked me if I wanted to come with him to work at San Fernando.

Q. What did you say? A. Well, I told him that I would think it over.

Q. And did he come back? A. Yes; he came back on Tuesday.

Q. And did he talk to you again? A. Yes.

Q. And what did he talk to you about on Tuesday? A. Well, he asked me again if I had decided to go to work at his cantina in San Fernando, and I told him that I had not come to a decision yet.

Q. Did he tell you how much he would pay you to work for him? A. Yes; well, he said that he would pay me more than he would pay my friend. He offered me \$45, and he said that when we know how to work well, we might get a raise.

Q. Did you tell him that you had just come from Mexico? A. He did not ask me that.

Q. Did you at any time tell him that you were in the country illegally? A. Yes, sir.

Q. And when was this that you told him that? A. That was when he proposed to give me the job of going to work for him in San Fernando.

Q. Just what did you tell him about being in the country illegally? A. That I had no papers, that I had come through the wire fence.

Q. Did you tell him how long you were here? A. Yes, but I had already been here once before.

Q. Now, did you talk to him again? Did he come back to see you again? A. I met him—on Wednesday I met him on Main Street.

Q. Did you talk to him then? A. Yes.

Q. What did you talk about? A. Well, I told him that I had decided to come up here to work with him.

Q. And what did he say? A. Well, he said that that was very well, and that was when we went into the cantina, El Cafetal.

Q. And did you see this other girl, Maria Margarita? A. Yes; she served us.

Q. When were you supposed to go to San Fernando? A. Well, he, Mr. Martinez, was to arrange everything, he was to find another gentleman who was to take us to San Fernando.

Mr. Sankary: Would you stand up, Mr. Doty?
(Gentleman in courtroom rises.)

Q. By Mr. Sankary: Have you seen this man before? A. Yes, he was the one who brought us up.

Q. Did you see Mr. Doty, the man standing back there, and Mr. Martinez, talking together at any time? A. No, sir, not until the night before that we left.

Q. Well, on that night before you left did you see them talk together? A. Yes, on the night that we left.

Q. And did they talk in English, or Spanish? A. English.

Q. Have you seen this suit case before? Let the record show I am indicating Government's Exhibit No. 1. A. Yes. My friend gave it to Mr. Martinez so that he would bring it to her.

Q. Now, did you get into Mr. Doty's car? A. Yes, sir.

Q. And did you drive towards San Fernando? A. Yes, sir.

Q. And were you caught by the Immigration officers? A. Yes, sir.

Mr. Sankary: I have no further questions.

Cross-examination

By Mr. Mandel:

Q. Is it Miss or Mrs. Rodriguez? A. Mrs.

Q. Is your family in Mexico or in the United States? A. In Mexico.

Q. I take it from your testimony that this is not the first time that you have been in the United States? A. No.

Q. How many times have you been in the United States before this? A. The first time I came was on September 22nd, 1952.

Q. How long were you in the United States then? A. The Immigration took me out on October the 27th.

Q. You were arrested then; is that it? A. No.

The Court: Well, it doesn't make any difference.

Mr. Mandel: I just want to come to a certain thing later, your Honor.

The Court: Well, let us not admit non-essentials, so far as this case is concerned, if she went back to Mexico—there are many things I can understand as you go along here without too many minute details.

Mr. Mandel: Well, the motive of the witness will go into this, especially if they were arrested three or four times.

Q. You were afraid of the Immigration officers when you were arrested, were you? A. No, why should I be afraid? I knew very well that they would send me back to Mexico again.

Q. Didn't you know if you came to the United States illegally that ultimately you would go to jail? Didn't you know that?

Mr. Sankary: To which I object as calling for the conclusion of the witness.

The Court: Well, let her be asked that.

Mr. Sankary: They all know that; it is argumentative, your Honor.

The Court: If they come in illegally, why, they know the consequences.

Mr. Sankary: That is what I mean, your Honor.

Q. By Mr. Mandel: Now, you saw Mr. Martinez for the first time Monday night when you were in this cafe, Copa de Ora, is that right? A. Yes, sir.

Q. Do you remember a man by the name of Mares? A. No, I never heard him mentioned.

Q. Well, is the Copa de Ora the cafe that he has? A. I only know that the owner of the cafe's name is Tony, but I don't know his last name.

Q. Do you know if it is Tony Mares? A. I do not know.

Q. And when you saw Mr. Martinez on that occasion, on the first time you met him, did you serve him anything to drink? A. Another of the girls that was working there served him.

Q. Do you know how many beers were served to him? A. No, I did not notice that.

Q. While he was being served by this other waitress, were you called over then, is that it? A. Yes.

Q. And you said something, or this girl said to you, 'You are going up there.' What did she mean by that? A. I meant to Los Angeles.

Q. You had already made arrangements to go to Los Angeles, isn't that right? A. No.

Q. Well, hadn't you planned and discussed this with the friend before Mr. Martinez ever came on the scene? A. Well, I had mentioned to her that I wanted to go up to Los Angeles, but just in passing

without having any plans, just as one may say any other thing.

Q. Well, anyway, when Mr. Martinez mentioned to your girl friend something about giving a job to one of you girls in Los Angeles, that was the time she made the statement to you, 'Well, you want to go up there, and he is going up there,' was that the conversation? A. No.

Q. Well, what did your friend actually tell you? A. Well, she called me and she said, 'Look, come here. This gentleman here is looking for a girl or two because he has a cantina over there in San Fernando, and he is looking for a couple of girls to take up and work for him.'

Q. Did he specify any particular time when he wanted you to be employed? A. He told me that he was going to look for a gentleman to take us there, and that he would let me know.

Q. Did he mention anybody's name? A. No, sir.

Q. On the second occasion, on a Tuesday, Martinez, you stated, came to see you again; is that right—or came to the cafe, rather? A. Yes, sir.

Q. And on that occasion did you serve him? A. Yes.

Q. And did you serve him any alcoholic drinks? A. No, only beer.

Q. Beer? How many beers?

(To the Court) She said 'no alcoholic drinks.' I was wondering if beer—

The Court: What difference does it make?

Mr. Mandel: It is our contention that all these people were drunk.

The Court: Unless you want to show—

Mr. Mandel: I can show that all these people were drunk to a great extent.

Q. You were drunk on that occasion, weren't you, on Tuesday? A. No.

Q. How about Mr. Martinez, wasn't he drunk? A. No.

Q. Cold sober? He was very sober, was he? A. No; I don't think he was **drunk**.

Q. He was cold sober; was that it? A. Just as I see him now, he was there.

Q. Just the same way. Let me ask you this: In the street where you were working there were about 12 or 15 bars, weren't there—on that same street? A. Yes, there are quite a few of them.

Q. In about a two-block area there are about 35—

The Court (Interposing): You are speaking now—

Mr. Mandel: Well, I was there, your Honor; I saw it.

The Court: Well, you are speaking as to this defendant, whether he hit every bar or not?

Mr. Mandel: Well, we have got testimony—

The Court (Interposing): Well, you can develop from this witness what she knows.

Mr. Mandel: Yes, I understand.

Q. How many beers did he have in your place? A. I don't know; I did not count them.

Q. You are sure that Mr. Martinez had a conversation with Mr. Doty, the gentleman who stood up here? A. Well, they talked a few words before we left there, and the gentleman was explaining what he was talking about a trip, and that was just before we left.

Q. Did you see the suitcase sent out from Brawley? A. No sir, the last time I saw it was when it was left in Mr. Martinez' car.

Q. Mr. Martinez, you testified, did not ask you whether you were an alien, or whether you were here legally or otherwise? A. Yes, and I told him that I had no papers.

Q. You mean, he asked you whether you had come in legally, do you say? A. No; when he offered me work I told him that I was afraid to accept it for fear that I would be caught because I had no papers.

Q. Well, did he ask you whether you were in the United States legally or illegally? Did he ask you that? A. Yes, that is why I told him that I had no papers.

Mr. Mandel: No further questions.

Mr. Sankary: I have no further questions of this witness, your Honor,—

(Witness leaves stand.)"

Thus, Immigration Officer WILLIAM W. BEGGS testified:

"The Clerk: Your name, please?

The Witness: William W. Beggs.

Direct Examination.

By Mr. Sankary:

Q. Mr. Beggs, you are an Immigration officer?

A. Yes, sir.

Q. Directing your attention to Government's Exhibit 1 for identification, have you seen this bag before? A. Yes, I have.

Q. Can you tell us where you first saw it? A. I first saw it in the house on Hollister Street, I don't remember the number, in San Fernando.

Q. At whose house? A. Sir?

Q. At whose house was that? A. Mr. Martinez'.

Q. The defendant's home? A. Yes.

Q. And can you tell us the circumstances surrounding your finding the bag? A. Yes. Inspector Pussell and I went out to Mr. Martinez' house about 9:00 p. m. on or about April 2nd, 1953, and when we knocked on the door Mrs. Martinez came to the door and we asked her if her husband, Ernest Martinez, was at home, and then she stated to us that he wasn't home and she didn't know when he would return. And—now, the—could I elaborate, your Honor?

The Court: Yes.

The Witness: We were together, this other inspector and I—can I refer to this as 'we'—asked her? I don't remember who directly asked her—

Mr. Sankary: All right.

The Witness: We asked her if there was any baggage there for two girls that were coming to her house, and she just stated that there was no baggage, that she wasn't sure.

Mr. Sankary: I want to get rid of the bag; the aliens are going to be deported tonight—if counsel has no objection—would counsel have any objection?

The Court: You had better not deport them before this trial is over.

Mr. Mandel: There might be something develop; I don't know.

Cross-Examination.

By Mr. Mandel:

Q. You didn't see Mr. Martinez when you saw this valise there? A. No, I did not see Mr. Martinez.

The Court: Well, let's not go into the cross-examination now.

Mr. Mandel: I didn't think of—

Mr. Sankary: I really don't know the purpose of the cross-examination unless counsel intends to say he didn't pick up the bag.

The Court: Certainly he has a right—

Mr. Mandel: Certainly we will say that.

The Court: He has a right to cross-examination, particularly in view of the fact that most of the testimony is hearsay testimony as to what the wife told him.

Mr. Sankary: I am willing to do this, I am willing to strike any testimony about what the wife is supposed to have said, that the officer testified to.

Mr. Mandel: All right, then.

The Court: Well, we will continue this until tomorrow.

Mr. Mandel: Do you have to get back to—

The Witness: No, I came down here to attend this trial.

Mr. Mandel: I just wish really to ask him one question and that is about this card.

The Court: Now listen, your questions get complicated. Don't let us go into any further cross-examination; don't lead us on with the simplicity of your purpose.

Mr. Mandel: Very well, your Honor.

The Court: We have a jury coming in tomorrow.

Mr. Sankary: What time tomorrow morning, your Honor, 9:45?

The Court: Do you have any witnesses other than your client?

Mr. Mandel: I have the defendant and one or two witnesses from Brawley that will not be too long.

I should think that we will get through in the morning.

Mr. Sankary: I am through.

Mr. Mandel: Well, I am going to use Mr. Doty as my witness, so that will be another witness.

The Court: All right, say 9:45 tomorrow morning.

(Further discussion concerning time of continuance.)

The Court: We might do this, come in at 9:45, and then we will go along for 15 minutes and then we can impanel the jury and—

Mr. Mandel: I will be here at 9:30.

(Whereupon at 5:30 o'clock p. m. an adjournment was taken until Thursday, June 4, 1953, at the hour of 9:45 o'clock a. m.)

San Diego, California, Thursday, June 4, 1953.
9:45 o'clock a. m.

The Court: Are you ready to proceed with the case on trial?

Mr. Sankary: Yes, your Honor.

Mr. Mandel: Yes, your Honor.

Mr. Sankary: Will Mr. Beggs resume the stand, please?

WILLIAM W. BEGGS,

previously called and sworn as a witness by and on behalf of the plaintiff, resumes the stand and testifies further as follows:

Cross-Examination (Continued).

By Mr. Mandel:

Q. Officer, when you went to the house at San Fernando and Mrs. Martinez was there at the time

—that is what you testified yesterday, is that correct? A. Yes.

Q. And you saw the valise at that time that is marked for identification, did you not—at that time?

A. Yes.

Q. You don't know how the valise arrived at San Fernando? A. No."

The Court aptly summarized the case at the conclusion of the evidence, and the appellee adopts the following record of the Court's comments as its argument with respect to the evidence herein:

"The Court: Well, in this case I don't think I want to hear any argument. The evidence wasn't very lengthy, and I have notes that I made as to the important points in the case. It is purely a question of fact. The question of law has been disposed of; I have already denied your motion as to the law involved—that is, as to the constitutionality of the Act.

In this case I will have to—in order to find for the defendant—I will have to disbelieve the prosecuting witnesses, and I will have to disbelieve the effects of the evidence as to the suitcase, or the valise, and to discard all of it; and I will have to disbelieve some of the portions of the testimony of the other defendant who has pled guilty in this case, which I cannot do.

The two girls have testified positively that this defendant asked them to come up and work for him and he would make arrangements for them to come up there, and the suitcase was delivered to him for that purpose. And while it isn't definite who this person might be, from the testimony of the two girls they were positive in their statement that he said he would arrange for them being taken up there, and he mentioned \$50 for that service.

The defendant apparently went to the hotel or apartment house, or whatever it was, where one of these girls live, and there is no denial of the fact on the part of the defendant, nor is there a denial that someone was in the room with these two girls when Doty, the other defendant, arrived; he, however, hardly recognized somebody there, he was reluctant to tell all he knew. I think he knew more than he wanted to tell, but nevertheless what he did tell was that there was some man in there and that it might be the defendant, he wasn't sure.

There is no question in my mind but what this defendant came down there and met these girls and induced them, apparently, from the conversation which was related, to come up there to be employed by him at a wage which was almost twice what they were getting at that place.

Now, it is true that the defendant didn't personally take them up there, but I am satisfied he caused these arrangements to be made, to have them transported up there. He, himself, of course, doesn't have to do the transporting to be guilty of an offense under the statute. He can act through somebody else. And if he made arrangements for their transportation that puts him in the enterprise the same as if he did that himself.

Now, without this suitcase there might be some doubt created, but there is no question in my mind that he told these girls where his address was, and of course, we have to assume all the way through that they were aliens, not entitled to live here, and that they were recent arrivals—recently arrived aliens.

From what the girls stated, we have to assume that they were illegal entrants and that they had

told him when they came in—although the evidence does not quite definitely specify that particular fact. However, from what they told him, and as was testified to, he either knew or had reasonable grounds to believe that the entry of these girls occurred less than three years prior to this alleged offense, and so on that theory I think he was aware of that particular situation.

Now, referring again to that valise, the tag on the valise, if he was entirely innocent of that matter, and the valise came there without his knowledge or without his acquiescence or consent, it is significant that it remained in his house for three weeks, or thereabouts, without anything being done about it; and a prudent man who receives a package of that kind by surprise, and not knowing where it comes from, would observe the address from whence it came and would return it. I think any careful man, a business man particularly, and this man apparently is a business man of some means, from his own statement he has a gas station and he has some trucks, and he has some houses, and a man can't prosper to that extent without being a prudent, careful business man.

I don't doubt but that he has a good reputation in the community in which he resides. The witnesses have so testified. However, that is no different than, for example, a bank teller who has lived a life of— an upright life in the community all of his life up until the time of his defalcation or embezzlement, or whatever may have happened that got him into trouble. Some of these people in business concerns who take money either from a bank or other business concern, who work there maybe 20 or 25 years until sometime or other they have committed an offense, and this man may have had, and probably has had, a

good reputation. I would consider that in this case the same as a jury would. There is no doubt in my mind that he procured their transportation for the purpose of having them work for him up there.

He had the knowledge or the means of knowledge available to him as to their being illegal entrants into this country.

Why he went to Brawley I don't know. He said he went down there to find work, if possible, for his trucks. There is no evidence that he took the trucks down there. I assume that he might have, but that doesn't make any difference, his chief business was—apparently—he said he had a cantina, or saloon, in San Fernando. And these women that work in those places, I imagine, are difficult to employ; there aren't that many of them, except probably in the Valley down there. There are a lot of them there, they have been in court here frequently, where they have come in from Mexico illegally—many of them—and are sent back. Many of them come over here and do that kind of work, and have done it. We had six of them here a couple or three days ago in that same category. They were picked up in these places, and everybody knows it. People that employ them, they know that they come here for that purpose. They are apparently a profitable source of revenue to these people that employ them. They work as waitresses and they work as solicitors for drinks in these establishments; they drink with the patrons and encourage the spending of the money for the drinks by these patrons. While that is a matter outside of the record in this case, those are matters of common knowledge.

I find the defendant guilty as charged in Count 3."

VII.

Conclusion.

1. Section 1324(a)(2) sufficiently defines the proscribed conduct intended by Congress. The classifications made in the statute are reasonable. There was no error of law in the denial of appellant's Motion for a New Trial. Therefore, it is respectfully submitted that the judgment and the sentence of the trial court should be affirmed.

2. The evidence clearly established the defendant's guilt.

For the foregoing reasons and facts proved at the time of trial, it is accordingly urged that such judgment of conviction be affirmed, and that such order be made as is just and proper in the premises.

Respectfully submitted,

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Attorneys for Appellee.

No. 14065

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNESTO MARTINEZ-QUIROZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT.

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FILED

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No. 14065

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNESTO MARTINEZ-QUIROZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT.

I.

Argument on Law of Case.

Appellee in his brief cites the case of *Faustino Herrera v. United States of America*, No. 13733, decided by this court on November 19, 1953. This case invokes Section 8 of the Immigration Act of 1917, as amended by public law, No. 283, approved March 20, 1952. 66 Stats. 26, 8 U. S. C. A. 144(a)(2), without reiterating the language used by appellee in page 9 of his brief in setting forth the provisions of the Act governing the conviction in the *Herrera* case, it can be stated that appellant in the present case stood trial for the same charges as were extant in the *Herrera* case, namely, the,

“knowing that he is in the United States in violation of law, and knowing or having reasonable grounds

to believe that his last entry into the United States occurred less than three years prior thereto, transports or moves, or attempts to transport or move, within the United States, by any means of transportation or otherwise.”

The court since the filing of appellant’s opening brief, has decided adversely to the defendant Herrera’s position on the constitutionality of the statute and has, in effect sustained the statute, holding that,

“while the verbal arrangment of the Statute (1324) (a) (2) may be thought awkward, we are of the opinion that a reading of it as a whole in the light of congressional declaration of purpose leaves no rational doubt as to what was intended.”

In this connection the court went on to say “the claim of vagueness and uncertainty is bottomed on the employment in paragraph numbered (2) and 8(a) under which the indictment was drawn of the pronouns “he” and “his.”

It is said that this paragraph is susceptible of two radically different interpretations depending upon whether the pronoun “he” and “his” refer back to the phrase “any person” as used at the beginning of subdivision (a) or forward to the phrase “any alien” found in paragraph (4). The argument proceeds on a holding in *United States v. De Cadena*, 105 Fed. Supp. 202, 207, to the effect that the legislation is in this respect unconstitutional for vagueness.

Since the court, Judges Healy, Stephens and Pope sitting have decided unanimously as to the constitutionality

of the statute notwithstanding the decision of Judge Oliver Carter, by the District Court of Northern California, the present appeal on the constitutional issue appears to be *res judicata*.

There is no point in burdening the court with any further recitation on this issue. Suffice to say counsel wishes to adopt the opinion of Judge Oliver Carter in *United States v. De Cadena* and made a part of this appeal by reference.

While the present appeal and the *Herrera* case present violations of the same statute the resemblance there ends.

In the *Herrera* case the matter was submitted on stipulated facts. The sole issue there to be resolved was the constitutionality of the statute. Such is not the case at bar.

II.

Facts Did Not Establish Guilt of Defendant Martinez-Quiroz Beyond a Reasonable Doubt.

Appellant has submitted a statement of the facts in his brief. In doing so he has quoted at length the entire testimony of the girl aliens who were produced as government witnesses. There is nothing in the record to show that they were in custody from the time of their apprehension until ultimate disposition of the case, but it may be noted that government counsel, Morris Sankary at page 5 of the transcript used the following language.

“Mr. Sankary: I want to get rid of the bag; the aliens are going to be deported tonight—if counsel has no objection—would counsel have any objection?”

The Court: You had better not deport them before this trial is over.”

Thus the direct implication from this language is obvious that aliens were in custody awaiting deportation upon the conclusion of defendant Martinez' case.

Government counsel has relied upon the testimony of the aliens as the principal factor leading to the conviction of defendant. Since the aliens, particularly Enedina Rodriguez Sancione had illegally entered the United States on at least one prior occasion she must have realized when apprehended that she might be given a jail term in addition to her deportation. The least that can be said is that her testimony as well as that of the other aliens was interested and biased.

Certainly the desire of the aliens was to get off as lightly as possible. For that reason, courts have universally carefully scrutinized this testimony and have rejected same if not supported by more disinterested evidence.

Mention is made in appellee's brief that Martinez' purpose in going to Brawley was not an innocent one. The innuendo is that the purchase of hay was not his real objective but rather, the acquisition of employees for his cafe in San Fernando. There is nothing in the record to dispute testimony of defendant on this point. And there is testimony in the record on the part of the aliens that the idea of going to Los Angeles was conceived by them. Thus at page 35 of the transcript, lines 10-16, appears the following language on this point.

"A. Well, there was a friend of mine there, and she called me and told me 'Look you going to go up there, don't you?' and I said, 'Yes,' and 'Well, this gentleman is looking for people who want to go up there.'

Q. 'And what did he say to you?' A. 'He asked me if I wanted to come with him to work at San Fernando.' "

There is testimony as to quite a bit of drinking on the part of defendant. Of course the aliens state that defendant was not drunk. However they do admit defendant had been drinking in the cafes. If defendant Martinez was ultimately under the influence of intoxicating liquor, he could have told them about his place of business.

Finally, as to the issue of the valise, there is testimony that the aliens put the valise in Martinez' car. However, there is no question but that defendant did not take the valise to his home. It did arrive at his home, it is true, but there is a dearth of testimony on who sent it there.

Government counsel did not comment on co-defendant Doty who pleaded guilty nor quoted. As stated in the opening brief there is not a scintilla of evidence showing Martinez to be a conspirator with him in the offenses with which he was charged. Quite the contrary, there is evidence of a contact man, a "short man" with whom Doty dealt. Thus, at page 63 of transcript, lines 8-22, the following language appears:

"The Court: Did he resemble this defendant here?

The Witness: None whatsoever; this man isn't definitely the man.

The Court: You are sure about that?

The Witness: I am positive on that.

The Court: How do you know he isn't the man if you don't remember whom you saw?

The Witness: He was very small, far smaller than that, he was real small.

The Court: Then why can't you remember this man here, his looks, if you saw him in the room where these two girls were; if there was this difference between them, why is your recollection so faulty as to this particular defendant?

The Witness: It is not that I am trying to withhold anything; that is the truth."

Summarizing the Testimony.

In considering the entire testimony, appellant feels that the evidence as presented has failed to establish the guilt of the defendant beyond a reasonable doubt and for that reason asks that the judgment against him be reversed and for all other proper relief.

Respectfully submitted,

J. B. MANDEL,

Attorney for Appellant.

No. 14067.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM DINNEEN,

Appellant,

vs.

ROBERT E. WILLIAMS,

Appellee.

BRIEF OF APPELLEE.

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No. 14067.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM DINNEEN,

Appellant,

vs.

ROBERT E. WILLIAMS,

Appellee.

BRIEF OF APPELLEE.

Foreword.

Dismissal of appellant's complaint by the District Court was correct because the complaint failed to present any federal question for determination and the Court lacked jurisdiction of the subject-matter.

ARGUMENT.

I.

No Federal Question Was Presented for Determination.

Neither equal protection nor privileges and immunities of citizens of the United States under the Fourteenth Amendment are involved. The equal protection clause applies only to a clear and intentional discrimination, no claim of which is made by appellant.

Snowden v. Hughes, 321 U. S. 1, 8, 88 L. Ed. 497, 503.

The privilege against false arrest and imprisonment is not a privilege incident to citizenship in the United States.

Watkins v. Oaklawn Jockey Club (1949, D. C. Ark.), 86 Fed. Supp. 1006;

Hague, et al. v. C. I. O., et al., 307 U. S. 496, 518, 83 L. Ed. 1423, 1438 (concurring opinion of J. Stone).

The due process clause of the Fourteenth Amendment is not shorthand for the first eight Amendments (*Wolf v. Colorado*, 338 U. S. 25, 93 L. Ed. 1782), and it was not intended by the Fourteenth Amendment and the Civil Rights Act that all matters formerly within the exclusive cognizance of the states should become matters of national concern.

Snowden v. Hughes (supra), 321 U. S. 1, 11, 88 L. Ed. 497, 505.

"But it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. . . . What then are the circumstances of this case?"

Holmes, J., in *Moyer v. Peabody*, 212 U. S. 78, 84, 53 L. Ed. 410, 416.

No "circumstances of the case" are pleaded by appellant to enable the Court to determine what due process is claimed to have been denied appellant. The due process of criminal procedure, as set forth in the Penal Code of the State of California (Penal Code, Secs. 825, 834, 835, 836, 841, 849) provide for arrest and detention for a reasonable time prior to presentation before a magistrate.

An asserted denial of due process "is to be tested by an appraisal of the totality of facts in a given case."

Betts v. Brady, 316 U. S. 455, 462, 86 L. Ed. 1595, 1602.

But no facts showing any denial of due process are contained in appellant's complaint, merely a bare conclusion that his arrest and imprisonment were without warrant, without probable cause, and that due process of law was denied him. [R. 3.]

In *Lyon v. Weltmer* (1949, C. A. 4th, Md.), 174 F. 2d 473, cert. den., 338 U. S. 850, 94 L. Ed. 520, which was an action against the Superintendent of the Maryland State Hospital for the Insane, the Court said at page 474:

" . . . a cause of action for false arrest or false imprisonment against the superintendent of an insane

asylum by one who claims to have been improperly confined therein . . . if far from being a case arising under the Constitution and laws of the United States of which the federal courts are given jurisdiction by statute. . . . If it did every case against a state officer for false arrest or false imprisonment would be cognizable in the federal courts."

The *Lyon v. Weltmer* case is followed and cited in:

Whittington v. Johnston (1953, C. A. 5th, Ala.),
201 F. 2d 810;

Wglesias v. Gulfstream Park Racing Ass'n (1953,
C. A. 5th, Fla.), 201 F. 2d 817.

False arrest and imprisonment is a form of trespass and has its genesis in and is governed by the local law of the state, which provides a remedy for such trespass, if such occurred.

Penal Code, Sec. 236;

Dillon v. Haskell, 78 Cal. App. 2d 814, 178 P. 2d
462;

Miller v. Fano, 134 Cal. 103, 66 Pac. 183.

Due process in all phases of an arrest, arraignment and trial is guaranteed by the California State Constitution (Art. I, Sec. 13) and by provisions of the California Penal Code (Secs. 681-689). Appellant's only averment in relation thereto is an allegation that no probable cause existed for his arrest. [R. 3, 4.] If any basis existed for such action of false arrest, the state courts were open to him, with the right of appeal to the highest state court, and if any rights guaranteed to him by the Federal Constitution

were really denied, resort was then available to the Federal Supreme Court.

McCartney v. West Virginia (1946, C. A. 4th, W. Va.), 156 F. 2d 739.

“For a plaintiff to invoke successfully the jurisdiction of the District Court on the ground that he seeks protection of a federal right, his complaint on its face must appear to raise a substantial federal question; a mere claim in words is not sufficient.”

Williams v. Miller, 48 Fed. Supp. 277, 279, 280, affirmed 317 U. S. 599, 81 L. Ed. 489, rehearing denied, 318 U. S. 799, 87 L. Ed. 1163.

In an annotation upon the subject in 12 American Law Reports 2d 1, at pages 58-59, it is said:

“The federal question must appear by a statement of facts in legal and logical form such as is required in good pleading. . . . A mere conclusion of the pleader that the case is one arising under the Constitution, laws or treaties of the United States is inadequate.”

In a recent case, the Circuit Court of Appeals for the Fifth Circuit said:

“But to show that defendant deprived plaintiff of rights and immunities secured by the Fourteenth Amendment, or caused it to be done, or conspired to that end, plaintiff relies upon bare generalities and conclusions, unsupported by factual allegations. If this be sufficient, then every state court case of false imprisonment may be brought within federal jurisdiction by the mere unsupported assertion that as a conclusion of such false imprisonment the plaintiff was deprived of due process, or of other rights se-

cured by the Fourteenth Amendment. The decisions are to the contrary. . . . *Lyon v. Weltmer*, 4 Cir., 174 Fed. 473; *Taylor v. Smith*, 7 Cir., 167 F. 2d 797, 12 A. L. R. 2d 1; note, 14 A. L. R. 2d, text page 1100, *et seq.*; *McGuire v. Todd*, 5 Cir., 198 Fed. 60; and the many cases cited in note 5 to that opinion, particularly *Givens v. Moll*, 5 Cir., 177 Fed. 765; *Bottone v. Lindsley*, 10 Cir., 170 Fed. 705; *Moffat v. Commerce Trust Co.*, 8 Cir., 187 F. 2d 242. . . ."

Yglesias v. Gulfstream Park Racing Assn. (1953, 5th Cir., Fla.), 201 Fed. 817.

It is respectfully submitted that, tested by the above rules, appellant's complaint was inadequate and failed to present any federal question for determination.

II.

The District Court Lacked Jurisdiction of the Subject-matter.

The District Court, being one of limited jurisdiction, has not only the power, but the duty on its own motion to determine if the case is one arising under the United States Constitution, laws or treaties. The authorities unanimously agree that the asserted Federal question must be real and substantial.

Anno., 12 A. L. R. 2d 1, 29, note 1.

While generally jurisdiction does not depend on the possibility that the averments might fail to state a cause of action on which appellant might recover, yet two important exceptions are found in that a suit may be dismissed for want of jurisdiction where (1) The alleged claim

under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or (2) Such a claim is wholly insubstantial or frivolous.

Bell v. Hood, 327 U. S. 678, 682, 683, 90 L. Ed. 939, 943.

It is not contended or suggested in appellant's complaint that the remedies afforded by the state courts were not open to him, nor that any impediment to due process existed in the use of such courts. The language quoted from *Snowden v. Hughes (supra)*, is further strengthened by the observations of the court in *Collins v. Hardyman*, 341 U. S. 651, 95 L. Ed. 1253, that the Civil Rights Act "was not to be used to centralize power so as to upset the federal system."

The cases cited by appellant in support of his contention are clearly distinguishable from the present case, in that in each case cited by appellant, the pleader averred facts to show in what manner due process was denied.

In *Picking v. Penn. Ry. Co.* (1945, C. A. 3rd, Penn.), 151 F. 2d 240, allegations of conspiracy to violate the Uniform Extradition Act, of the falsity of the warrant, of failure to arraign and assault and battery by the arresting officers, were set forth.

In *McShane v. Moldovan* (1949, C. A. 6th, Mich.), 172 F. 2d 1016, the plaintiff alleged facts to show a conspiracy to obstruct and defeat justice and a denial of due process by hand-picking a jury.

In *Screws v. United States*, 325 U. S. 91, 89 L. Ed. 1495, the right of the federal government to prosecute criminally under Section 20 of the Criminal Code was sustained on an indictment that factually described an assault and battery resulting in death, as a part of systematic scheme of arrest in certain cases.

The test of jurisdiction set forth in *United States v. Classic*, 313 U. S. 299, 326, 85 L. Ed. 1368, 1383, that color of law is "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law" is not met by an allegation of simple arrest for a public offense committed in the officer's presence, and incarceration therefor. This proposition finds authority not only in the rule that the tortious conduct is not in exercise of state law, but contrary to it,

Martin v. Lankford (1918), 245 U. S. 547, 62 L. Ed. 464, 38 S. Ct. 205;

Woodhouse v. Budwesky (1934, C. A. 4th, Va.), 70 F. 2d 61, cert. den., 293 U. S. 573, 79 L. Ed. 671, 55 S. Ct. 84;

McCartney v. West Virginia (1946, C. A. 4th, W. Va.), 156 F. 2d 739;

Lyon v. Weltmer (1949, C. A. 4th, Md.), 174 F. 2d 473;

Martin v. Holbrook (1907, C. C. Cal.), 157 Fed. 716;

Screws v. United States, 325 U. S. 91, 138, 89 L. Ed. 1495, 1522 (dissenting opinion of Justices Roberts, Frankfurter and Jackson),

but also by the fact that the right to arrest for a public offense committed in the presence of the arresting person, is given to every person by California law (California Penal Code, Sec. 837), as well as by common law.

9 Halsbury's Laws of England (2d Ed., London, 1933), Secs. 112-117;

4 Stephens' Commentaries on the Laws of England (21st Ed., London, 1950), Chap. 15, pp. 222. 223.

It is submitted that appellant's claim, as set forth in his complaint is so insubstantial and lacking in any essential facts from which an invasion of any federally protected rights may be inferred, that jurisdiction of such an action is not conferred on the United States District Court.

III.

Conclusion.

Appellee submits that the judgment of the lower court is correct and should be affirmed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney;

ROBERT B. BURNS,
Deputy City Attorney,
Attorneys for Appellee.

No. 14069

United States
Court of Appeals
for the Ninth Circuit

JAN CASIMIR LEWENHAUPT,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

FEB - 9 1954

PAUL P. O'BRIEN
CLERK

No. 14069

United States
Court of Appeals
for the Ninth Circuit

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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

SAMUEL TAYLOR, Esq.,
WALTER G. SCHWARTZ, Esq.

For Respondent:

L. A. MARCUSSEN, Esq.

DOCKET ENTRIES

1949

July 5—Petition received and filed. Taxpayer notified. Fee paid.

July 6—Copy of petition served on General Counsel.

Aug. 23—Answer filed by General Counsel.

Aug. 23—Request for hearing in San Francisco, Calif., filed by General Counsel.

Aug. 30—Notice issued placing proceeding on San Francisco calendar. Service of answer and request made.

1950

Mar. 8—Hearing set May 8, 1950, San Francisco, Calif.

Mar. 29—Motion for continuance to the next San Francisco calendar filed by petitioner—granted.

Aug. 31—Hearing set November 1, 1950, San Francisco, Calif.

Sept. 14—Motion for continuance to the next San Francisco, calendar filed by petitioner—granted.

1951

- Jan. 8—Hearing set March 12, 1951, San Francisco, California.
- Mar. 5—Changing date to March 19, 1951, San Francisco, California.
- Mar. 26, Apr. 4, 5, 6—Hearing had before Judge Harron on merits. Petitioner's oral motion to amend petition—granted. Amended petition, stipulation of facts No. 1 and No. 2 and answer to amended petition filed. Copies served. Briefs, June 4, 1951. Replies, June 25, 1951.
- May 1—Stipulation regarding exhibits filed.
- May 7—Transcript of Hearing 3/26/51 filed.
- May 7—Transcript of Hearing 4/3/51 filed.
- May 7—Transcript of Hearing 4/4/51 filed.
- May 7—Transcript of Hearing 4/5/51 filed.
- June 4—Motion for extension to July 19, 1951 to file briefs, filed by petitioner. Granted.
- July 6—Motion for extension to Aug. 20, 1951 to file briefs filed by taxpayer, granted.
- Aug. 13—Motion for extension to Sept. 10, 1951 to file briefs filed by taxpayer, granted.
- Aug. 14—Order extending time to Sept. 10, 1951 to file original briefs and October 10, 1951 to file reply briefs, entered.
- Sept. 5—Joint motion for extension to October 10, 1951 to file brief, filed, granted.
- Oct. 4—Joint motion for extension to Nov. 10, 1951 to file brief, filed 10/4/51—Granted.
- Nov. 8—Joint motion for extension to Dec. 10, 1951 to file brief, filed. 11/9/51—Granted.

1951

Nov. 9—Order that original briefs are due Dec. 10, 1951 and reply briefs are due December 31, 1951, entered.

Nov. 13—Motion for leave to file the attached brief filed by taxpayer. 11/14/51—Granted.

Nov. 13—Brief filed by taxpayer.

Dec. 11—Motion for leave to file brief, brief lodged, filed by General Counsel. 12/26/51—Granted.

Dec. 28—Motion for extension to January 21, 1952 to file reply brief, filed by taxpayer. 12/28/51—Granted. Copy served.

1952

Jan. 15—Motion for extension to February 4, 1952 to file reply brief, filed by taxpayer. 1/16/52—Granted.

Feb. 4—Reply brief filed by taxpayer. Copy served.

1953

Apr. 23—Findings of fact and opinion rendered. Judge Harron. Decision will be entered under Rule 50. Copy served.

June 1—Computation for entry of decision filed by General Counsel.

June 3—Hearing set July 22, 1953 on Respondent's computation.

June 12—Consent to settlement filed by taxpayer.

June 12—Decision entered. Judge Harron. Div. 13.

Aug. 31—Stipulation Re Venue filed.

Sept. 8—Petition for review by U. S. Court of Appeals for the Ninth Circuit filed by taxpayer.

1953

Sept. 8—Designation of contents of record on review filed by taxpayer.

Sept. 17—Proof of service of petition for review filed.

Sept. 17—Proof of service of designation of contents of record on review, filed.

The Tax Court of the United States

Docket No. 24042

JAN CASIMIR LEWENHAUPT,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing the symbols IRA:90-D:HM and dated May 6, 1949, and as a basis of his proceeding alleges as follows:

1. Petitioner is an individual residing in San Mateo, California.

2. The notice of deficiency (a copy of which is attached to the original petition filed in this case as Exhibit A and is incorporated by reference in, and made a part of, this Amended Petition as Exhibit

A hereof) was mailed to petitioner by registered mail on May 6, 1949.

3. The taxes in controversy are income taxes in the amount of \$38,166.25 for the taxable year ended December 31, 1946. Of said amount, \$33,820.30 is the deficiency determined by the Commissioner, and \$4,345.95 represents an overpayment by the petitioner of which refund is sought. All of said amount of \$38,166.25 is in controversy. The petitioner's income tax return for said taxable year was filed with the Collector of Internal Revenue for the District of Maryland at Baltimore, Maryland.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The Commissioner erred in including in petitioner's taxable income for the taxable year ended December 31, 1946 any portion of a long-term capital gain realized by petitioner on the sale on or about January 23, 1946 of certain improved real property located in Modesto, California.

(2) The Commissioner erred in failing to allow to petitioner for the taxable year ended December 31, 1946 the exemption from income taxes from gains derived from the sale or exchange of capital assets provided for in the Tax Convention between the United States and Sweden.

(3) The Commissioner erred in determining that petitioner was engaged in trade or business within the United States during the taxable year ended December 31, 1946.

(4) The Commissioner erred in determining that the amount of the long-term capital gain realized

by petitioner on the sale of certain improved real property located in Modesto, California was \$152,665.02 rather than \$152,555.87.

(5) The Commissioner erred in taxing the dividends from United States sources received by petitioner during the taxable year ended December 31, 1946 at a rate in excess of the 10% rate provided for in the Tax Convention between the United States and Sweden.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

(1) Petitioner not later than June 15, 1947 duly filed with the Collector of Internal Revenue at Baltimore, Maryland an income tax return for the taxable year ended December 31, 1946. Said return was prepared on the basis of taxpayer's being a nonresident alien not engaged in trade or business within the United States and was submitted on Form 1040 NB-a. Said return showed income taxes due from the petitioner for the said taxable year of \$4,345.95, which amount petitioner duly paid.

(2) Petitioner on or about January 23, 1946 sold certain improved real property located in Modesto, California, on which sale he realized a long-term capital gain of \$152,555.87, rather than \$152,665.02 as erroneously stated in the notice of deficiency. Said gain is exempt from United States income taxes under the provisions of Section 211(a) and (c) and/or Section 22(b)(7) of the Internal Revenue Code and Article IX of the Tax Convention between the United States and Sweden.

(3) Petitioner was at all times during the tax-

able year ended December 31, 1946 a nonresident alien and was at all times during said taxable year a citizen and resident of the Kingdom of Sweden.

(4) Petitioner was not engaged in trade or business within the United States during any part of the taxable year ended December 31, 1946.

(5) Petitioner had no permanent establishment in the United States during any part of the taxable year ended December 31, 1946.

(6) During the taxable year ended December 31, 1946, petitioner received dividends from United States sources in the amount of \$8,511.25. Under the provisions of Section 22(b)(7) of the Internal Revenue Code and Article VII of the Tax Convention between the United States and Sweden, United States income taxes on said dividends are limited to 10% thereof.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in income tax for the taxable year ended December 31, 1946 due from petitioner, and that there is a refund of \$4,345.95 in income taxes for said taxable year due to petitioner, and that this Court may grant such further relief as may to it seem proper.

Dated: San Francisco, California, March 14, 1951.

Respectfully submitted,

/s/ SAMUEL TAYLOR,

/s/ WALTER G. SCHWARTZ,

Counsel for Petitioner

State of California,
City and County of San Francisco—ss.

Jan Casimir Lewenhaupt, being first duly sworn,
deposes and says:

He is the petitioner named in the foregoing
amended petition; he has read said amended peti-
tion and is familiar with the statements contained
therein; and such statements are true, except those
stated to be upon information or belief, and those
he believes to be true.

/s/ JAN CASIMIR LEWENHAUPT

Subscribed and sworn to before me this 23rd day
of March, 1951.

[Seal] /s/ LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California. My com-
mission expires August 27, 1951.

EXHIBIT A

Treasury Department

Internal Revenue Service

74 New Montgomery St., San Francisco 5, Calif.

Office of Internal Revenue Agent in Charge, San
Francisco Division.

IRA:90-D:HM

May 6, 1949

Mr. Jan Casimir Lewenhaupt

c/o Samuel Taylor

1211 Balfour Bldg., San Francisco 4, Calif.

Exhibit A—(Continued)

Dear Mr. Lewenhaupt:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1946, discloses a deficiency of \$33,820.30, and that the determination of your income tax liability for the taxable year ended December 31, 1945, discloses an overassessment of \$242.66, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Exhibit A—(Continued)

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner

/s/ By HENRY J. BRU,
Acting Internal Revenue Agent in
Charge

Enclosures: Statement, Form 1276, Form Waiver,
Form 843.

Statement

Tax Liability for the Taxable Years ended December 31, 1945 and December 31, 1946.

Year	Overassessment	Deficiency
1945 Income tax	\$242.66	
1946 Income tax		\$33,820.30

In making this determination of your income tax liability, careful consideration has been given to your protest filed January 28, 1949, and to the statements made at the conference held on March 10, 1949.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district, and will be applied by that official in accordance with section 322(a) of the Internal Revenue Code, provided that you fully protect yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue

Exhibit A—(Continued)

for your district, a claim for refund on form 843, a copy of which is enclosed, the basis of which may be as set forth herein.

A copy of this letter and statement has been mailed to your representative, Mr. Samuel Taylor, 1211 Balfour Building, San Francisco 4, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

Adjustments to Net Income—Year 1945

Net income as disclosed by return.....	\$ 4,990.69	
Unallowable deductions and additional income:		
(a) Dividends	\$7,465.00	
(b) Capital gains	3,875.22	11,340.22
	<hr/>	<hr/>
Total		\$16,330.91
Nontaxable income and additional deductions:		
(c) Rental income		734.18
		<hr/>
Net income as adjusted.....		\$15,596.73

Explanation of Adjustments

(a) From available information it has been determined that you were engaged in business within the United States during 1945 and that your income is therefore taxable under section 211(b) of the Internal Revenue Code, which provides that dividends are to be included in gross income. Your

Exhibit A—(Continued)

income is therefore increased by \$7,465.00 representing dividends received during 1945.

(b) Gain realized on the sale of real property by the Hastings Estate Properties which is held to be gain from sale of capital assets held for more than six months, was not included in the computation of net income due to the fact that you reported on the basis of a non-resident alien not engaged in a trade or business in the United States. Since it has been determined that you were engaged in a business within the United States, your income is increased by your one-fourth interest in the gain realized amounting to \$7,750.44 which is recognized at 50% or \$3,875.22.

(c) Available information discloses that at the beginning of the year 1945 you held a one-sixth interest in the corpus of the Hastings Estate Trust and that during the year you acquired an additional one-twelfth interest on settlement of litigation which has been instituted in 1942, making your total interest, one-fourth of the corpus. Your income is therefore decreased by \$734.18 representing the additional one-twelfth interest in the loss realized from the operation of the rental property for the year 1945.

Computation of Alternative Tax—Year 1945

Net income\$15,596.73

Less: Excess of net long-term

capital gain over net short-

term capital loss 3,875.22

Exhibit A—(Continued)

Ordinary net income.....	\$11,721.51	
Less: Surtax exemptions.....	500.00	
		<hr/>
Balance (surtax net income) ..	\$11,221.51	
Surtax on \$11,221.51		\$3,104.17
Ordinary net income.....	\$11,721.51	
Less: Normal tax exemption..	500.00	
		<hr/>
Balance subject to normal tax..	\$11,221.51	
Normal tax at 3% on \$11,221.51.....		336.65
		<hr/>
Partial tax		\$3,440.82
50% of excess of net long-term capital gain over net short-term capital loss		1,937.61
		<hr/>
Alternative tax		\$5,378.43

Computation of Tax—Year 1945

Net income	\$15,596.73	
Less: Surtax exemption.....	500.00	
		<hr/>
Surtax net income	\$15,096.73	
Surtax on \$15,096.73		\$4,775.46
Net income	\$15,596.73	
Less: Normal tax exemption..	500.00	
		<hr/>
Normal tax, 3% of \$15,096.73.....		452.90
Normal tax net income.....	\$15,096.73	
		<hr/>
Total tax		\$5,228.36
Alternative tax		\$5,378.43
Correct income tax liability.....		\$5,228.36

Exhibit A—(Continued)

Income tax disclosed by return—page 1— line 6 (Original, Account No. 6350089— June List Maryland District).....	5,471.02
---	----------

Overassessment of income tax.....	\$ 242.66
-----------------------------------	-----------

Adjustments to Net Income—Year 1946

Net income as disclosed by return (loss) ..	\$ 9,293.12
---	-------------

Unallowable deductions and	
----------------------------	--

additional income:	
--------------------	--

(a) Dividends	\$ 8,511.25
---------------------	-------------

(b) Interest	21.34
--------------------	-------

(c) Capital gain	76,332.51	87,865.10
------------------------	-----------	-----------

Total	\$75,571.98
-------------	-------------

Nontaxable income and	
-----------------------	--

additional deductions:	
------------------------	--

(d) Other deductions	175.50
----------------------------	--------

Net income as adjusted.....	\$75,396.48
-----------------------------	-------------

Explanation of Adjustments

(a) and (b) From available information it has been determined that you were engaged in business in 1946 within the United States and that your income is therefore taxable under section 211(b) of the Internal Revenue Code, which provides that dividends and interest be included in your gross income. Dividends of \$8,511.25 and interest of \$21.34 are therefore included in the computation of your net income.

(c) The convention with Sweden effective Janu-

Exhibit A—(Continued)

ary 1, 1940, provides that the treatment of gain derived from the sale of real property situated in the United States, by a non-resident alien individual resident in Sweden be governed by the provisions of the Internal Revenue Code applicable generally to the taxation of non-resident aliens.

It is held that non-resident aliens engaged in business within the United States must include in gross income profits derived from the sale within the United States of real property located therein.

Since it is held that you were engaged in business within the United States during the year, your income is accordingly increased by \$76,332.51, computed as follows:

Net selling price of Modesto property...\$238,903.40
Less:

Cost price\$52,648.50

Depreciation allowable

(2% to 2/28/1946)..... 20,264.62

Adjusted cost basis.....\$32,383.88

Cost basis of land..... 53,854.50 86,238.38

Long-term capital gain realized.....\$152,665.02

Long-term capital gain recognized—50% \$ 76,332.51

(d) Deduction for depreciation in the amount of \$175.50 has been allowed on building which was sold in the computation of net income for the period January 1, 1946 to February, 1946, the date of sale. This depreciation has been included in depreciation allowable as explained under item (c) above.

Exhibit A—(Continued)

Computation of Alternative Tax—Year 1946

Net income	\$75,396.48	
Less: Excess of net long-term capital gain over net short- term capital loss	76,332.51	
<hr/>		
Ordinary net income.....	\$ 0.00	
Partial tax	\$ 0.00	
50% of excess of net long-term capital gain over net short-term capital loss...	38,166.26	
<hr/>		
Alternative tax	\$38,166.26	

Computation of Income Tax—Year 1946

Net income	\$75,396.48	
Less: Exemptions	500.00	
<hr/>		
Balance	\$74,896.48	
Tentative tax	\$46,086.14	
Less: 5% of \$46,086.14	2,304.30	
<hr/>		
Total income tax.....	\$43,781.84	
Alternative tax	\$38,166.25	
Correct income tax liability.....	\$38,166.25	
Income tax disclosed by return, page 1 (Original, Account No. 6350032—June List Maryland District).....	4,345.95	
<hr/>		
Deficiency in income tax.....	\$33,820.30	

[Endorsed]: T.C.U.S. Filed March 26, 1951.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS I.

It is hereby stipulated by and between counsel for the petitioner and counsel for the Commissioner in the above-entitled case that the following facts may be taken as true in said case:

1. Petitioner's full name is Jan Casimir Eric Emil Lewenhaupt. He is a Swedish Count. He was born on April 1, 1916. From the date of his birth to November 1948 he was a nonresident alien and a resident and citizen of the Kingdom of Sweden. Petitioner became a resident of the United States in November 1948.

2. Prior to November 1948, the petitioner was physically present in the United States only during the following periods:

(a) Four times prior to November 20, 1946, the last of which was in 1931 when he was 15 years old;

(b) From November 20, 1946 to December 20, 1946.

At no time prior to November 1948 did petitioner perform any personal services within the United States.

3. On or before its due date, petitioner filed his income tax return for the calendar year 1946 with the Collector of Internal Revenue for the District of Maryland, at Baltimore, Maryland. A true and correct copy of said return is attached hereto as Exhibit 1-A. Petitioner paid to said Collector the amount of taxes shown to be due by said return.

4. Prior to the calendar year 1941, petitioner owned no real or personal property in the United States. He was, however, the beneficiary of a trust established under the Will of his mother, Azalea Caroline Lewenhaupt (also known as Azalea Caroline Lewenhaupt-Falkenstein) the corpus of which comprised real property and securities in the United States. Petitioner's mother died in 1925. Under the trust established by her will, petitioner received the income therefrom until he attained the age of 25, at which time the trust terminated and the corpus thereof was distributed to him. Petitioner attained the age of 25 years on April 1, 1941.

5. On January 28, 1941, petitioner appointed Clinton La Montagne (also known as E. C. La Montagne) as his agent for the management of the properties which petitioner was to receive upon termination of the said trust. A copy of the power of attorney granted by petitioner to Mr. La Montagne is attached hereto as Exhibit 2-B. Petitioner revoked said power of attorney effective as of December 31, 1946.

6. [Omitted.]

7. The petitioner at one time or another during the calendar year 1946 held legal title to and owned only the following real property situated in the United States:

(a) Lots 29, 30, 31 and 32 in Block 68, 10th and J Streets, Modesto, California. (This property is sometimes hereinafter and elsewhere in the proceeding referred to as "the Modesto property.")

(b) 1786-90 San Jose Avenue, San Francisco,

California. (This property is sometimes hereinafter and elsewhere in the proceeding referred to as "the San Jose Ave. property.")

(c) 679-85 Sutter Street, San Francisco, California. (This property is sometimes hereinafter and elsewhere in the proceeding referred to as "the Sutter St. property.")

(d) 114 West Poplar Avenue, San Mateo, California. (This property is sometimes hereinafter and elsewhere in the proceeding referred to as "the West Poplar property.")

8. On June 12, 1946, the petitioner through Mr. La Montagne decided to purchase real property located at 100-104 South El Camino Real, San Mateo, California. (This property is sometimes hereinafter and elsewhere in the proceeding referred to as "the El Camino Real property.") On that date, he took an option upon said property, made a down payment of \$10,000.00 and paid a commission of \$3,375.00 thereon. On January 2, 1947, petitioner through Mr. La Montagne exercised said option and acquired legal title to this property on said date. Petitioner neither received any rent nor paid nor incurred any expenses with regard to this property prior to January 1, 1947. The cost of this property was \$67,500.00. The improvements thereon comprised a single structure containing three stores. Prior to the acquisition of legal title to this property by petitioner, all three stores had been leased to different lessees by the then owner, each of said leases being for a 5-year

term expiring on June 30, 1951. The provisions of these leases were identical in all material respects, and a copy of one of them is attached hereto as Exhibit 3-C. Petitioner still owned this property on December 31, 1947.

9. The fair market value of the Modesto property during the calendar year 1946 was \$240,000.00. The fair market value of the Sutter St. property during the calendar year 1946 was \$75,000.00.

10. The Modesto property consisted of a single structure containing several stores. This property was acquired by petitioner on April 1, 1941 upon termination of the trust created for his benefit under the Will of his mother.

11. On January 12, 1938, while it still comprised a part of the corpus of said trust, the Modesto property was leased to the Stelling Leasehold Corporation, a California corporation (the name of which was later changed to the Stelling Properties Corporation), for a 50-year term commencing January 1, 1938. On January 12, 1938, petitioner executed an agreement, in which, as beneficiary of the said trust he undertook to be bound by said lease. A copy of said lease and agreement is attached hereto as Exhibit 4-D.

12. On December 20, 1945, petitioner through Mr. La Montagne entered into an agreement with the Stelling Properties Corporation for the sale of the Modesto property to said corporation. A copy of said agreement is attached hereto as Exhibit

5-E. Mr. La Montagne communicated with petitioner's father before making said agreement and secured his approval thereof. Legal title to the Modesto property was transferred to the Stelling Properties Corporation on January 23, 1946.

13. The long-term capital gain from the sale of the Modesto property was \$152,555.87 computed as follows:

Net Selling Price	\$238,903.40
Basis of Improve- ments	\$52,648.50
Depreciation Allow- able	20,155.47
	<hr/>
Adjusted Basis	\$32,493.03
Basis of Land	53,854.50
	<hr/>
Total Basis	86,347.53
	<hr/>
Long-Term Capital Gain.....	\$152,555.87

(The above corrects an error contained on page 6 of the Commissioner's notice of deficiency, which erroneously treated the sale as having been made on February 28, 1946 and erroneously determined the amount of said gain to be \$152,665.02.)

14. Petitioner is entitled to an additional deduction for depreciation for the calendar year 1946 in the amount of \$66.35 rather than the \$175.50 additional allowance made by the Commissioner's notice of deficiency, page 5.

15. When petitioner acquired the Modesto property, it was subject to a mortgage in the amount of \$24,500.00. Petitioner through Mr. La Montagne regularly made payments of interest upon said mortgage, but made no payment of principal until the date of sale of the Modesto property. Petitioner through Mr. La Montagne paid said mortgage in full upon the date of the sale of said property.

16. The property at 1786-90 San Jose Avenue, San Francisco, California, consisted of a single structure containing three stores. Petitioner through Mr. La Montagne acquired this property on October 24, 1941 in exchange for a parcel of real property acquired upon the termination in 1941 of the trust created under his mother's Will.

17. On March 1, 1945, petitioner through Mr. La Montagne leased the store at 1788 San Jose Avenue to a tenant on a month-to-month basis. A copy of this lease is attached hereto as Exhibit 6-F. This lease was operative from March 15, 1945 through February 28, 1946. A new lease was entered into with the same lessee on February 1, 1946, to be effective for a 3-year term commencing March 1, 1946. A copy of this lease is attached hereto as Exhibit 7-G. The lessee used this store as an electrical repair and radio shop.

18. The store at 1786 San Jose Avenue was leased to the same tenant from at least November 1941 through February 28, 1949, and was used as a beauty shop. On January 31, 1946, petitioner

through Mr. La Montagne leased said store to said tenant to be effective for a 3-year term commencing February 1, 1946. The provisions of this lease were in all material respects identical to those of Exhibit 7-G.

19. The store at 1790 San Jose Avenue was leased to the same tenant from at least November 1941 through December 1948 for use as a restaurant and tavern. A copy of the lease which was in effect from September 1, 1944 through December 31, 1947 is attached hereto as Exhibit 8-H.

20. Petitioner through Mr. La Montagne purchased the real property at 679-85 Sutter Street, San Francisco, California, on December 3, 1945 at a cost of \$79,645.36. This property comprised a building containing two stores and ten studios (which studios was leased as a unit.)

21. On October 10, 1945, prior to the purchase of this property by the petitioner through Mr. La Montagne, the store at 679 Sutter Street had been leased by its then owner for a 3-year term for use as a cocktail lounge commencing October 1, 1945. A copy of this lease, which was in effect from October 1, 1945 to September 30, 1948, inclusive, is attached hereto as Exhibit 9-I.

22. On December 27, 1945, the petitioner through Mr. La Montagne leased the store at 681 Sutter Street for a 3-year term commencing January 1, 1946 for use as a ladies tailor shop. A copy of this lease, which was in effect from January 1, 1946 to

December 31, 1948, inclusive, is attached hereto as Exhibit 10-J.

23. The remaining portion of the Sutter Street property, 683-5 Sutter Street, consisted of ten studios and a basement, which were leased as a unit. On December 27, 1945, petitioner through Mr. La Montagne leased this portion of the property to a tenant for a 3-year term commencing January 1, 1946. The provisions of this lease were identical to those of Exhibit 7-G in all material respects, except that the lessee was specifically granted the power to sub-lease any and all of the studios. This lease was in effect through December 31, 1949.

24. On December 18, 1946, petitioner became the owner of certain real property located at 114 West Poplar Avenue, San Mateo, California. The cost of said property was \$29,500.00 and included the assumption of a mortgage in the amount of \$16,-211.31. The improvements on said property comprised a residence. Said property was vacant from December 18, 1946 to December 31, 1946, inclusive. During the calendar year 1947, said property was leased to a tenant on a month-to-month basis.

25. There was no mortgage or other indebtedness upon any of the real properties owned by the petitioner during the calendar year 1946 except the mortgage indebtedness on the Modesto property referred to in Paragraph 15, above.

26. Petitioner neither paid for nor furnished any janitorial services or utilities for any of the real properties owned by him during the year 1946.

[Title of Tax Court and Cause.]

27. The gross rentals received by petitioner from his United States real properties during the calendar year 1946 and the expenses thereof during said calendar year were as stated in Schedule A hereto.

28. The details of the amounts expended by petitioner for maintenance and repairs of his United States real properties during the calendar year 1946 were as follows:

Date	Property	Repairs
	1786-90 San Jose Ave.	
2/28/46	Roof Repairs	\$ 35.00
5/31/46	Painting	13.20
6/30/46	Replacement of window shades..	7.89
		<hr/>
		\$ 56.09
	679-85 Sutter Street	
3/31/46	Painting	\$1,023.00
4/30/46	Roof Repair	760.00
4/30/46	Steam Pipe Repair.....	20.73
12/30/46	Ceiling Repair	35.00
12/ 6/46	Steam Pipe Repair.....	10.76
12/16/46	Hot Water System Replacement	1,163.66
12/16/46	Roof Repairs	60.00
		<hr/>
		\$3,073.15
		<hr/>
	Total.....	\$3,129.24

29. During the calendar year 1946, petitioner received dividends from United States sources in the amount of \$8,511.25 and received interest from

United States sources in the amount of \$21.34. Under the provisions of Article VII of the Tax Convention between the United States and Sweden, United States income taxes on such dividends are limited to 10% of the amount of such dividends.

Dated: San Francisco, California, March 26, 1951.

/s/ SAMUEL TAYLOR,

/s/ WALTER G. SCHWARTZ,
Counsel for Petitioner

/s/ CHARLES OLIPHANT,
Counsel for Respondent

SCHEDULE A TO STIPULATION OF FACTS I.

Description	Gross Rentals	Taxes	Insurance	Maintenance and Repair	Interest	Deprecia- tion	Net Rentals
Modesto Property.....	\$ 843.31	\$	\$	\$	\$94.38	\$ 66.35	\$ 682.58
San Jose Ave. Property..	2,093.00	277.66	106.01	56.09	.....	1,236.95	416.29
Sutter Street Property.....	8,705.99	2,541.02	472.24	3,073.15	.....	2,389.37	230.21
	<u>\$11,642.30</u>	<u>\$2,818.68</u>	<u>\$578.25</u>	<u>\$3,129.24</u>	<u>\$94.38</u>	<u>\$3,692.67</u>	<u>\$1,329.08</u>

[Endorsed]: T.C.U.S. Filed March 26, 1951.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS II.

It is hereby stipulated by and between counsel for the petitioner and counsel for the Commissioner in the above-entitled case, subject to objection on brief by either party on the ground that the subject matter of this stipulation is immaterial and irrelevant, that the following facts may be taken as true in said case:

30. In addition to the five properties described in paragraphs 7 and 8 of stipulation of Facts I, petitioner was also the owner at various times during the period from April 1, 1941 to December 31, 1947, inclusive, of the following described real properties situated in the United States and no others: (All of said real properties were improved.)

(a) 2027 Hyde Street, San Francisco, California. (This property is sometimes hereinafter and elsewhere in the proceeding referred to as "the Hyde St. property.") This property was acquired by petitioner on April 1, 1941 upon termination of the trust created for his benefit under the will of his mother and was sold on October 24, 1941.

(b) Locust and Sacramento Streets, San Francisco, California. (This property is sometimes hereinafter and elsewhere in the proceeding referred to as "the Locust & Sacramento property.") This property was acquired by petitioner on April 1, 1941 upon termination of the trust created for his benefit under the Will of his mother and was exchanged on October 24, 1941 for the San Jose Ave. property

described in Paragraph 16 et seq. of Stipulation of Facts I.

(c) Hyde and Pacific Streets, San Francisco, California. (This property is sometimes hereinafter and elsewhere in the proceeding referred to as "the Hyde & Pacific property.") This property was acquired by petitioner on April 1, 1941 upon termination of the trust created for his benefit under the Will of his mother and was sold on September 11, 1941.

(d) 755 Brannan Street, San Francisco, California. (This property is sometimes hereinafter and elsewhere in the proceeding referred to as "the Brannan St. property.") This property was acquired by petitioner on April 1, 1941 upon termination of the trust created for his benefit under the Will of his mother and was sold on December 10, 1941.

(e) 251-9 Highland Avenue, Burlingame, California. (This property is sometimes hereinafter and elsewhere in the proceeding referred to as "the Burlingame property.") This property was purchased by petitioner through his agent on December 10, 1941 at a cost of \$11,695.84 and was sold on December 31, 1944 for \$11,000.00. The improvements thereon comprised a single structure containing two stores.

31. Baldwin Howell, a real estate firm of San Francisco, California, acted as agent during the calendar year 1947 for the management of all of petitioner's then-owned real property in the United States, except the West Poplar property (de-

scribed in Paragraph 24 of Stipulation of Facts I). Davis & Clifton, a real estate firm of Burlingame, California, acted as agent during the calendar year 1947 for the management of the West Poplar property.

32. There was no mortgage or other indebtedness upon any of the real properties owned by petitioner during any part of the calendar years 1941 through 1947, except the mortgage indebtedness on the Modesto property referred to in Paragraph 15 of Stipulation of Facts I and on the West Poplar property referred to in Paragraph 24 of Stipulation of Facts I.

33. The gross rentals received by petitioner from his United States real properties, and the expenses thereof, during the calendar year 1941 are as stated in Schedule B hereto. The gross rentals received by petitioner from his United States real properties, and the expenses thereof, during the calendar years 1942 and 1943 are as stated in Schedule C hereto. The gross rentals received by petitioner from his United States real properties, and the expenses thereof, during the calendar years 1944, 1945 and 1947 are as stated in Schedule D hereto. (For 1946, see Paragraph 27 of Stipulation of Facts I and Schedule A thereto.)

34. During the calendar year 1941, petitioner through his agent paid for and furnished janitorial services and utilities for the real properties owned by him as indicated in Schedule B hereto. During the calendar years 1942 through 1947, neither petitioner nor his agent paid for or furnished any jani-

torial services or utilities for any of the real properties owned by him.

35. The details of the amounts expended by petitioner's agent for the maintenance and repair of his United States real properties during the calendar years 1943, 1944, 1945 and 1947 were as follows: (Such information for the calendar years 1941 and 1942 is not available; for the calendar year 1946 see Paragraph 28 of Stipulation of Facts I.)

Date of Payment	Description	Repairs
1943		
	251-9 Highland Avenue Burlingame, California	
8/25/43	Lock Repair	\$ 2.00
	1786-90 San Jose Avenue	
1/12/43	Painting	155.00
3/22/43	Electrical Repair	124.70
4/16/43	Repairs	125.00
5/ 7/43	Repairs	10.50
5/21/43	Lock Repair	3.00
8/ 1/43	Painting	125.00
Total Repairs for 1943.....		\$545.20
1944		
	1790 San Jose Avenue	
12/ 4/44	Hot Water Heater Repair.....	\$ 56.69
	Burlingame Property	
5/ 4/44	Repairs to Front	208.95
5/ 4/44	Roof Repairs	264.00
Total Repairs for 1944.....		\$529.64

Date of Payment	Description	Repairs
	1945	
	1786-90 San Jose Avenue	
12/11/45	Glass Repair	\$ 2.50
12/11/45	Awning Box Repair	10.00
		<hr/>
Total Repairs for 1945.....		\$ 12.50

	1947	
	1786-90 San Jose Avenue	
2/26/47	Roof Repairs	\$ 35.00
	685 Sutter Street	
7/27/47	Roof Repairs	60.00
	San Mateo	
12/ 4/47	Roof Repairs	19.80
		<hr/>
Total Repairs for 1947.....		\$114.80

Dated: San Francisco, California, March 26,
1951.

/s/ SAMUEL TAYLOR,
/s/ WALTER G. SCHWARTZ,
Counsel for Petitioner

/s/ CHARLES OLIPHANT,
Counsel for Respondent

SCHEDULE B TO STIPULATION OF FACTS II.

Description	Gross Rentals Received	Taxes and Insurance	Janitorial Services	Utilities	Maintenance and Repair	Interest	Depreciation	Net Rentals
1941								
Hyde St. property.....	\$1,231.42	\$151.97	\$ 76.09	\$247.61	\$ 488.60	\$.....	\$ 255.46	\$ 11.69
Locust & Sacramento property.....	1,179.91	243.58	26.88	68.07	346.07	.....	253.31	242.00
Modesto property.....	9,900.00	.....	.....	.....	.....	918.81	789.73	8,191.46
Hyde & Pacific property....	698.38	158.44	20.43	58.23	366.64	.....	322.40	(227.76) *
Brannan St. property.....	620.00	176.46	.....	.....	174.32	.....	188.45	80.77
San Jose Ave. property....	416.00	63.67	.....	.....	68.14	.....	206.15	78.04
Burlingame property.....	80.67	44.96	.....	.....	.....	.....	26.42	9.29
Total.....	14,126.38	\$839.08	\$123.40	\$373.91	1,443.77	\$ 918.81	\$2,041.92	\$8,385.49

* Loss.

SCHEDULE C TO STIPULATION OF FACTS II.

Description	Gross Rentals	Taxes	Insurance	Maintenance and Repair	Interest	Depreciation	Misc.	Net Rentals
1942								
Modesto property	\$13,200.00	\$	\$ 196.33	\$	\$1,225.08	\$1,052.97	\$	\$10,725.62
San Jose Ave. property	1,575.43	238.55	158.16	9.00	.....	1,236.89	.....	(67.17) *
Burlingame property	457.50	223.81	35.36	189.20	.....	316.72	.....	(307.59) *
Total	\$15,232.93	\$ 462.36	\$ 389.85	\$ 198.20	\$1,225.08	\$2,606.58	\$	\$10,350.86
1943								
Modesto property	\$13,200.00	\$	\$ 120.00	\$	\$1,225.08	\$1,052.97	\$	\$10,801.95
San Jose Ave. property	1,440.00	236.47	11.76	543.20	.....	1,236.89	9.50	(597.82) *
Burlingame property	270.00	219.27	70.56	2.00	.....	317.04	.....	(338.87) *
Total	\$14,910.00	\$ 455.74	\$ 202.32	\$ 545.20	\$1,225.08	\$2,606.90	\$9.50	\$ 9,865.26

* Loss.

SCHEDULE D TO STIPULATION OF FACTS II.

Description	Gross Rentals	Taxes	Insurance	Maintenance and Repair	Interest	Depreciation	Net Rentals
1944							
Modesto Property	\$13,200.00	\$	\$	\$	\$1,163.82	\$1,052.97	\$10,983.21
San Jose Ave. property	1,545.00	242.09		56.69		1,236.89	9.33
Burlingame property	350.00	135.95	44.50	472.95		184.94	(488.34)*
Total	\$15,095.00	\$ 378.04	\$ 44.50	\$ 529.64	\$1,163.82	\$2,474.80	\$10,504.20
1945							
Modesto property	13,200.00			12.50	1,248.26	1,052.97	10,886.27
San Jose Ave. property	1,935.00	254.66	85.51			1,236.95	357.88
Sutter St. property	700.00		88.23				611.77
Total	\$15,835.00	\$ 254.66	\$ 173.74	\$ 12.50	\$1,248.26	\$2,289.92	\$11,855.92
1947							
San Jose Ave. property	\$ 2,265.00	\$ 298.80	\$ 19.43	\$ 35.00	\$	\$1,236.95	\$ 674.82
Sutter St. property	8,591.88	2,734.42	50.82	60.00		2,389.37	3,357.27
South El Camino Real property	4,680.00	344.16	63.94	19.80		3,985.52	266.58
West Poplar property	3,000.00	230.20	43.70		700.91	1,000.00	1,025.19
Total	\$18,536.88	\$3,607.58	\$ 177.89	\$ 114.80	\$ 700.91	\$8,611.81	\$ 5,323.96

* Loss.

[Endorsed]: T.C.U.S. Filed March 26, 1951.

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed by the above-named petitioner, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the amended petition.

3. Admits the allegations contained in paragraph 3 of the amended petition, except denies that all of the deficiency is in controversy and that petitioner overpaid his income tax for the year 1946.

4. (1) to (5), inclusive. Denies the allegations of error contained in subparagraphs (1) to (5), inclusive, of paragraph 4 of the amended petition.

5. (1) Admits the allegations contained in subparagraph (1) of paragraph 5 of the amended petition, except denies that the amount of \$4,345.95 was "duly" paid.

5. (2) Admits that petitioner on or about January 23, 1946 sold certain improved real property located in Modesto, California; denies the remaining allegations contained in subparagraph (2) of paragraph 5 of the amended petition.

(3) Admits the allegations contained in subparagraph (3) of paragraph 5 of the amended petition.

(4) and (5) Denies the allegations contained in subparagraphs (4) and (5) of paragraph 5 of the amended petition.

(6) Admits that during the taxable year ended December 31, 1946, petitioner received dividends from United States sources in the amount of \$8,-511.25; denies the remaining allegations contained in subparagraph (6) of paragraph 5 of the amended petition.

6. Denies generally and specifically each and every allegation in the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal
Revenue

Of Counsel:

B. H. NEBLETT,

Division Counsel,

T. M. MATHER,

LEONARD ALLEN MARCUSSEN,

Special Attorneys, Bureau of Internal
Revenue.

[Endorsed]: T.C.U.S. Filed March 29, 1951.

JOINT EXHIBIT 1-A

Form 1040 NB-a—Treasury Department, Internal
Revenue Service 1 Calif.

[Written in longhand]: See letter attached.

File Code: Jun 1 1947. Serial No. 6 350032. First
Payment: \$4,345.95.

[Stamped]: Paid Jun 10 1947 Coll. Int. Rev.
Baltimore, Md.

[Stamped]: Rec'd with remittance June 9 1947
Coll. Int. Rev. Dist. 52.

United States 1946

Nonresident Alien Income Tax Return

For a Nonresident Alien (Other than a Resident
of Canada or of the United Kingdom) not engaged
in trade or business within the United States whose
gross income from sources within the United States
was more than \$15,400.

For Calendar Year 1946 or fiscal year begin-
ing , 1946, and ending , 1947.

To be filed with the Collector of Internal Rev-
enue, Baltimore 2, Maryland, not later than the 15th
day of the 6th month following the close of your
taxable year.

Name: Jan Casimir Lewenhaupt, 21 Sandhamns-
gaten, 21 III, Stockholm, Sweden.

Gross Income

* * * * *

6. Rents and royalties	\$11,642.30
<hr/>	
8. Total of items 1 to 7	\$11,642.30

Joint Exhibit 1-A—(Continued)

Deductions

9. Contributions. (Explain in Schedule C)	\$ 150.00
10. Interest. (Explain in Schedule C)...	94.38
11. Taxes. (Explain in Schedule C)....	3,526.55
12. Depreciation (from Schedule B) and depletion. (Submit Schedule)	3,626.32
13. Other deductions authorized by law. (Explain in Schedule C).....	13,538.17
<hr/>	
14. Total of items 9 to 13.....	\$20,935.42
<hr/>	
15. Net income from sources within United States (item 8 less item 14) \$	9,293.12

Computation of Tax

16. Net income (item 15, above).....	\$ 9,293.12
17. Less: Exemptions (\$500 if not a resi- dent of Mexico; if a resident of Mexico, see Schedule D and In- struction 17)	500.00
<hr/>	
18. Balance (item 16 less item 17).....	\$ 9,793.12
19. Combined tentative normal tax and surtax on amount in item 18. (Use tax rates in Instruction 19.) (If item 4 above includes partially tax- exempt interest, see Instruction 19.) \$	None
20. Less: 5 percent of item 19.....	.....
<hr/>	

Joint Exhibit 1-A—(Continued)

21. Combined normal tax and surtax
 (item 19 less item 20).....\$ None
-
22. Total Income Tax (item 21, or 30 per-
 cent of item 8, whichever is larger) \$ 3,492.69
-
24. Balance of Income Tax.....\$ 3,492.69

Note: As to alien individuals residing in Sweden,
 see Instruction K.

Dividends\$8,511.25

Interest 21.34

\$8,532.59

Income Tax at 10%\$ 853.26

\$4,345.95

[Written in longhand]: See letter atc'h evidently
 no tax withheld at source.

* * * * *

Questions

1. Of what country are you a citizen or subject?
 Sweden. Resident? Sweden.
2. State your occupation or profession: Executive.
3. Did you file a return for any prior year? Yes.
 If so, what was the latest year? 1945. To which
 collector's office was it sent? Baltimore 2, Mary-
 land.
4. Have you excluded from gross income in this re-
 turn any item of fixed or determinable annual or
 periodical income derived from sources within
 the United States? No.

Joint Exhibit 1-A—(Continued)

I declare, under the penalties of perjury, that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct and complete return.

Date: 30/5/47.

/s/ JAN LEWENHAUPT,
(Signature of Taxpayer)

Date: 5/23/47.

/s/ E. C. H. CARSON,
(Signature of person (other than taxpayer or agent) preparing return)

CARSON & HARMS

369 Pine Street, San Francisco 4 (Name of firm or employer, if any)

JAN CASIMIR LEWENHAUPT
NONRESIDENT ALIEN INCOME TAX RETURN
CALENDAR YEAR 1946

Schedule C—Contributions:

Infantile paralysis fund.....	\$	25.00
American Red Cross		75.00
Community Chest		
San Francisco		25.00
San Mateo		25.00
Total.....	\$	150.00

Schedule C—Interest:

Interest on real estate mortgage.....	\$	94.38
---------------------------------------	----	-------

Schedule C—Taxes:

Real estate taxes on rental properties.....	\$	2,818.68
California income taxes		707.87
Total.....	\$	3,526.55

Joint Exhibit 1-A—(Continued)

Schedule C—Other deductions:

Agent's fee	\$ 7,580.00
Maintenance and repairs.....	3,134.14
Insurance	800.27
Traveling	1,650.00
Professional services	115.00
Dues and subscriptions	47.00
Telephone and telegraph	28.99
Postage	25.00
Cable charges	95.02
Safe deposit box	4.80
Other	57.95

Total.....\$13,538.17

Schedule B—Depreciation:

Property	Date		Cost	Depreciation	
	Acq.	Rate		Prior	1946
San Jose Ave. Bldg.	1926	6 $\frac{2}{3}$ %	\$18,553.31	\$5,153.77	\$1,236.95
Sutter St. Bldg.....	1945	3%	79,645.36	.....	2,389.37
			\$98,198.67	\$5,153.77	\$3,626.32

Schedule C—Income from Rentals:

Rentals	\$11,642.30	\$2,093.00	\$8,705.99	\$ 843.31
Expenses:				
Taxes	2,818.68	277.66	2,541.02	.....
Insurance	573.35	106.01	467.34	.....
Repairs	3,134.14	56.09	3,078.05	.....
Interest	94.38	.....	.....	94.38
Depreciation	3,626.32	1,236.95	2,389.37	.....
Total expense	\$10,246.87	\$1,676.71	\$8,475.78	\$ 94.38
Net income	\$ 1,395.43	\$ 416.29	\$ 230.21	\$ 748.93

Admitted in Evidence March 26, 1951.

JOINT EXHIBIT No. 2-B

GENERAL POWER OF ATTORNEY

Jan Casimir Eric Emil Lewenhaupt to
Clinton La Montagne

Know All Men By These Presents:

That I, Jan Casimir Eric Emil Lewenhaupt, have made, constituted and appointed, and by these presents do hereby make, constitute and appoint, Clinton La Montagne, my true and lawful attorney for me and in my name, place and stead, and for my use and benefit, to ask, demand, sue for, recover, collect and receive all such sums of money, debts, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me; to take and use all lawful ways and means in my name, or otherwise, for the recovery thereof, by legal process or otherwise, and to compromise and agree for the same, to grant and deliver acquittances or other sufficient discharges for the same, for me and in my name; to bargain, contract, agree for, purchase, receive and take lands, tenements, hereditaments, and accept the seisin and possession of all lands, and all deeds, and other assurances in the law therefor; and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements, and hereditaments, upon such terms and conditions, and under such covenants as he shall think fit; also to bargain and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, stocks, bonds, debentures and

other corporate securities, choses in action, and other property in possession or in action; and to make, do and transact all and every kind of business of what nature and kind soever; and, also, for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bills, bonds, notes, receipts, evidences of debts, releases and satisfactions of mortgage, judgment and other debts, and such other instruments in writing, of whatsoever kind and nature, as may be necessary or proper in the premises; also to represent me, and to vote any and all shares held by me, for the election of directors, and for or against any and all propositions, at any and all meetings of any corporation of which I am or may be a stockholder, and also to execute and deliver for me, and on my behalf, any and all proxies for the voting of any and all such shares for any and all of the purposes hereinabove set forth, and otherwise to exercise in my behalf all of my rights as such stockholder in any such corporation; and also, in particular, to exercise all of the powers hereinabove set forth for me and in my name, place and stead, and for my use and benefit, in connection with any and all property to which I may be entitled upon the termination on the 31st day of March, 1941, of those certain trusts set forth in the decree of final distribution of the estate of my mother, Azalea Caroline Lewenhaupt, (sometimes known and called Azalea Caroline Lewenhaupt-Falkenstein), deceased, made by the Superior Court of the State of California,

in and for the City and County of San Francisco, and filed on the 25th day of August, 1926, in that certain proceeding then pending in the said Court, numbered 40827.

Giving and Granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand and seal this 28th day of January, 1941.

[Seal]

JAN CASIMIR ERIC EMIL
LEWENHAUPT

Certificate of Acknowledgment of Execution
of Document

Kingdom of Sweden,
City of Stockholm—ss.

Giving and Granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, I have hereunto set my hand and seal this 28th day of January, 1941.

[Seal]

JAN CASIMIR ERIC EMIL
LEWENHAUPT

Certificate of Acknowledgment of Execution
of Document

Kingdom of Sweden, City of Stockholm,
Legation of the United States of America—ss.

I, F. C. Sigmond, Vice Consul, of the United States of America, at Stockholm, Sweden, duly commissioned and qualified, do hereby certify that on this 28th day of January, 1941, before me personally appeared Jan Casimir Eric Emil Lewenhaupt to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the annexed instrument, and being informed by me of the contents of said instrument he duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year last above written.

[Seal]

F. C. SIGMOND,

Vice Consul of the United States
of America

Fee No. 33, Two Dollars.

Fee No. 403, \$2.00 Kr. 8.60.

Recorded at request of C. La Montagne dated 28th Jan. 1941 at 1 min. past 10 a.m., Apr. 4, 1941. 3732 Official Records p. 325, City and County of San Francisco, California. P49881: \$1.30. Thos A. Toomey, Recorder.

Recorded at request of Charles W. Slack, Alaska Commercial Bldg., S. F., May 1, 1941 at 30 min.

past 9 a.m. in Vol. 730 of Official Records page 526,
Stanislaus County Records. 5707:NB \$1.40. R. G.
Waring, Recorder; by Lois Oberg, Deputy.
NB & MU

Admitted in Evidence March 26, 1951.

PETITIONER'S EXHIBIT No. 16

No. 724

E. C. LA MONTAGNE
Special

San Francisco, California, June 12th, 1946

Pay to the Order of

E. C. La Montagne.....\$3,375.00
x x x \$3,375 Dols and 00 Cts.....Dollars

/s/ E. C. LA MONTAGNE

Special

464 California Street 11-24
American Trust Company
Head Office San Francisco
San Francisco, California

[Endorsements back of check]

E. C. La Montagne

[Stamped]: 11-16 Pay only through S. F. Clear-
ing house 11-16 Jun 28 1946 Wells Fargo Bank
& Union Trust Co., San Francisco.

Admitted in Evidence April 4, 1951.

PETITIONER'S EXHIBIT No. 18

[Letterhead of Jerome Draper & Co., Realtors]

June 12, 1946

McDonald, Wilson & Draper
257 Primrose Road
Burlingame, California

Gentlemen:

Reference is hereby made to that certain option dated June 7, 1946 in favor of Jan C. Lewenhaupt covering property on El Camino Real, San Mateo, California.

In consideration of the fact that I am agent of the optionee, and in further consideration of the fact that the option price is on a net basis, I hereby waive any and all claim which I may have or may have had to commission for services performed in connection with said option or a sale resulting from the exercising of said option.

Yours very truly,

/s/ E. C. LA MONTAGNE
Jerome C. Draper

JCD:mr

Admitted in Evidence April 4, 1951.

PETITIONER'S EXHIBIT No. 21

[Title Insurance and Guaranty Co. Statement]

San Francisco, Cal., February 1, 1946

Application No. 421536 Trosak

E. C. LaMontagne—Special

369 Pine Street, San Francisco, California.

in re: Jan Casimir Lewenhaupt

Description—10th & J Streets, Modesto

Credit252,000.00

Pro rata Rents from 1/25 to

2/1/46 at \$36.67..... 256.69

Stamps on Deed 280.50

Paid American Trust Co..... 24,502.50

Recording Release 2.10

Title Fee 813.00

Notary Fee 1.00

B. P. Oliver Co..... 6,750.00

E. C. LaMontagne 5,250.00

Check Enclosed214,144.21

252,000.00 252,000.00

Admitted in Evidence April 4, 1951.

RESPONDENT'S EXHIBIT K

San Francisco Real Estate Board, 105 Montgomery St., Phone GArfield 1-2167, San Francisco, California.

Charges for the Collection of Rentals
(Effective, January 1, 1948)

Rents up \$100.....\$1.00 each
Rents over \$100 to \$200.....\$1.50 each
Rents over \$200.....1% of each rental

Subject to a minimum of \$1.00 for each rental.

The above schedule covers collection of rent only and does not include management or care of property

Charges for Property Management

Charges 3% to 5% of gross collections, plus renting and leasing commissions, depending on the type of property and the time and work involved.

Management includes payment of taxes, supervision of repairs, and maintenance and care of property.

Admitted in Evidence March 26, 1951.

RESPONDENT'S EXHIBIT L

Recommended Schedule of Minimum
COMMISSIONS AND CHARGES

For Members of the San Francisco Real Estate Board—Effective November 2, 1949

This Schedule of Commissions and Charges is regarded as being fair, minimum compensation for

services rendered and should govern all transactions involving property situated in the City and County of San Francisco.

Commissions on all transactions involving property outside of San Francisco shall generally be governed by the schedule and rates in force in the community in which the property is situated.

San Francisco Real Estate Board, 105 Montgomery St., San Francisco, Calif., GARfield 1-2167.

Sales

Property in the City of San Francisco, improved or unimproved; five per cent (5%) on the first \$50,000 of purchase price, plus two and one-half per cent (2½%) of the balance.

Minimum commission on any sale; \$50 on unimproved and \$100 on improved property.

Acreage and all other classes, five per cent (5%) of the purchase price.

Exchanges

Each party to an exchange shall pay the full commission based upon the consideration for the respective pieces of property so exchanged, the same as if a sale had been made by each party.

Loans

First Mortgage Loans: Two per cent (2%) of amount of loan on loans for a term of one (1) to five (5) years and where in excess of five (5) years charge three per cent (3%).

Second Mortgage Loans: Five per cent (5%) of the amount of loan up to and including \$2000, plus three per cent (3%) of the balance.

Renewals: One-half ($1\frac{1}{2}$) of scheduled rate.

Construction Loans: Three per cent (3%) of the amount of loan. In the event that the negotiation of the loan necessitates the supervision and disbursement of moneys during the period of construction, add an additional charge of two per cent (2%).

All above rates to be charged are net—borrowers to pay all additional fees and costs.

The minimum charge for making a loan is \$50.

Sale of a Leasehold

The broker is entitled to charge a regular leasing commission for the unexpired term of the lease as if a new lease had been made for a like period, plus five per cent (5%) of any cash or other consideration paid by the purchaser.

Appraisals

By individual members; fees shall be by agreement in each instance, depending upon amount of time and work involved and the type of report required.

Expert Testimony: Expert testimony in any local court; the minimum charge shall be \$50 per day, plus the cost of preparation based on the amount of time and work involved.

Leases

Commercial, Industrial and Residential Property: Not less than five per cent (5%) of the gross rental for the first year; plus not less than four per cent (4%) of the gross rental for the second year; plus not less than three per cent (3%) of the gross rental for the third year; plus not less than one and

one-half per cent ($1\frac{1}{2}\%$) of the gross rental thereafter for the full term of the lease.

Where the lease is the originating cause of new construction, the commission shall be computed as shown above for leases up to three (3) years then plus not less than two per cent (2%) of the gross rental for the term exceeding three (3) years.

Month-to-Month Tenancy: Commercial and Industrial: 50% of first month's rent where monthly rental does not exceed \$50. (Minimum \$10). 30% of first month's rent where monthly rental exceeds \$50. (Minimum \$25).

Residential: 30% of first month's rent in all cases. (Minimum \$10).

Advertising: All advertising of residential properties for lease or rental to be at the expense of the owner.

Renewal of Lease: Where the lease is renewed to the same tenant, whether placed by agent originally or otherwise, the minimum commission shall be one-half ($1\frac{1}{2}$) of the regular commission on the rental provided for in the new lease.

Taxes Payable by Lessee: Taxes and insurance on leased premises to be paid by the lessee shall be treated as part of the rent on which broker's commission is chargeable, using the taxes and insurance for the current year when ascertainable, otherwise those for the previous year, as a basis. In case of leased premises not previously assessed, the taxes are to be estimated.

Long Term Leases: The commission on a long term lease is to be at the regular leasing rate except

where such commission would exceed the sale commission; in that event a selling commission should be charged and the value be computed by capitalizing the average annual net income at five per cent (5%).

Commission on percentage leases on page five.

Management of Property

Charge 3% to 5% of gross collections, plus renting and leasing commissions, depending on the type of property and the time and work involved.

Management includes payment of taxes, supervision of repairs, and maintenance and care of property.

Collection of Rentals

Rents up to \$100: \$1.00 each.

Rents over \$100 to \$200: \$1.50 each.

Rents over \$200: 1% of each rental.

Subject to a minimum of \$1.00 for each rental.

Covers collection of rent only and does not include management or care of property.

Options

Options to Buy Property: Where a consideration, cash or otherwise, has been paid for an option arranged by the Realtor and the option is not exercised, the Realtor shall receive from the principal granting the option, one-half of the consideration received, but in no event shall this amount exceed the sale commission to which the Realtor would have been entitled had the option been exercised.

Where the Realtor is engaged to secure options by a prospective purchaser, for which only nominal

or no consideration is paid, and the options secured are not exercised, the Realtor shall receive compensation from the prospective purchaser by agreement, whether options are exercised or not.

Option to Extend Lease: Where the lease provides for an option to extend, the commission for the extension shall be computed as if same were a part of the original lease term but it shall be due and payable only upon the exercise of the option. Such commission, however, shall be deemed due and payable even though the rental or other terms of the option are modified or changed by agreement between lessee and lessor.

Option of Lessee to Purchase: Where the lessee is granted, under the terms of the lease, the option to purchase the leased property and the lessee exercises such option, the broker negotiating the lease will be entitled to the usual sale commission, less however, that portion of commission charged for the unexpired term of the lease from date of consummation of sale.

Percentage Leases:

1. If a minimum rental is specified the broker shall be paid, at the time lease is closed, a partial payment on account, based on commission rates for leases as hereinbefore set forth and computed on the aggregate of the specified minimum rental.

2. And additional commission, likewise, based on rates as hereinbefore set forth, shall be due broker on aggregate amount of rental realized by lessor in excess of specified minimum which amount may be determined by any of the following methods:

(a) By mutual agreement between Lessor and broker if they can agree upon an amount as an estimate of such excess; in which event the additional commission shall be then due and payable; or

(b) Either party may elect to await the actual realization, by the experience over the first year, or over the first two or three years of the lease term. If one year is selected, then the amount of excess rental realized during such period shall be the annual rate at which the aggregate for the remainder of the term shall be determined, or if the two or three year period is selected then the average of the annual excess over the said years so selected shall be such annual estimate, and additional commission shall then be due and payable at the rates hereinbefore set forth; or

(c) Additional commission shall be paid when and as said additional rentals are actually realized by Lessor, in which event, however, the commission shall be computed at the constant rate of five per cent (5%) instead of at the decreasing rates hereinbefore set forth.

3. Where no minimum rental is specified the broker shall be paid an initial payment on account, at the time the lease is closed, and which is to be computed as though the lease contained a minimum rental equivalent to seventy-five per cent (75%) of the fair current market rental value of premises and, in addition, a commission shall be paid on any rental realized by Lessor in excess thereof, which additional amount shall be determined as provided

in Paragraph 2 hereof and/or sub-paragraphs thereof.

Arbitration

Inability of parties to agree as to any of the foregoing, shall entitle either party to request a determination of same by either the Arbitration and Grievance Committee of the San Francisco Real Estate Board, or by arbitrators chosen in the usual manner, i.e., each party selecting an arbitrator and the two so selected appointing a duly qualified and competent umpire, and the decision in writing of any two of the said three arbitrators to be final; the parties to equally bear the expense of the said umpire.

Agreements in Writing

All agreements for deferred commission payments shall be in writing.

Realtor

A real estate broker who is a member of a constituent Board of the National Association of Real Estate Boards and who is pledged to conform to the Realtor's Code of Ethics. A Realtor may be recognized by the seal he so proudly displays.

In San Francisco, only members of the San Francisco Real Estate Board are realtors.

Admitted in Evidence March 26, 1951.

RESPONDENT'S EXHIBIT M

San Francisco, June 17th, 1946

Dear Eric:

* * * * *

As I told you in my last letter, I am purchasing a parcel of real estate in San Mateo for approx. \$66,750.00 which will return \$4,200 net per year and I will have about \$70,000 left from the sale of Modesto, to invest. I hope to find something before very long that will yield around 6% net, which will give us a total of about \$12,000. per year income. This will offset the income from Modesto, which netted us around \$11,000. per year.

I think the above analysis shapes up fairly well and is following the program that I have set up. The only difficulty that I am encountering is to get possession of the real estate before the first of 1947 —The sellers are all holding out in order to cover their profits by taking the full six months period in order to fall into the 25% bracket instead of the 50% bracket.

I am, still, at a loss as to how to divide the administration expenses unless I just cold bloodedly apportion an amount equal to the annual incomes from each estate, per month, and let it go at that.

* * * * *

Very sincerely,

/s/ CLINTON

Admitted in Evidence April 3, 1951.

RESPONDENT'S EXHIBIT N

February 6th, 1947

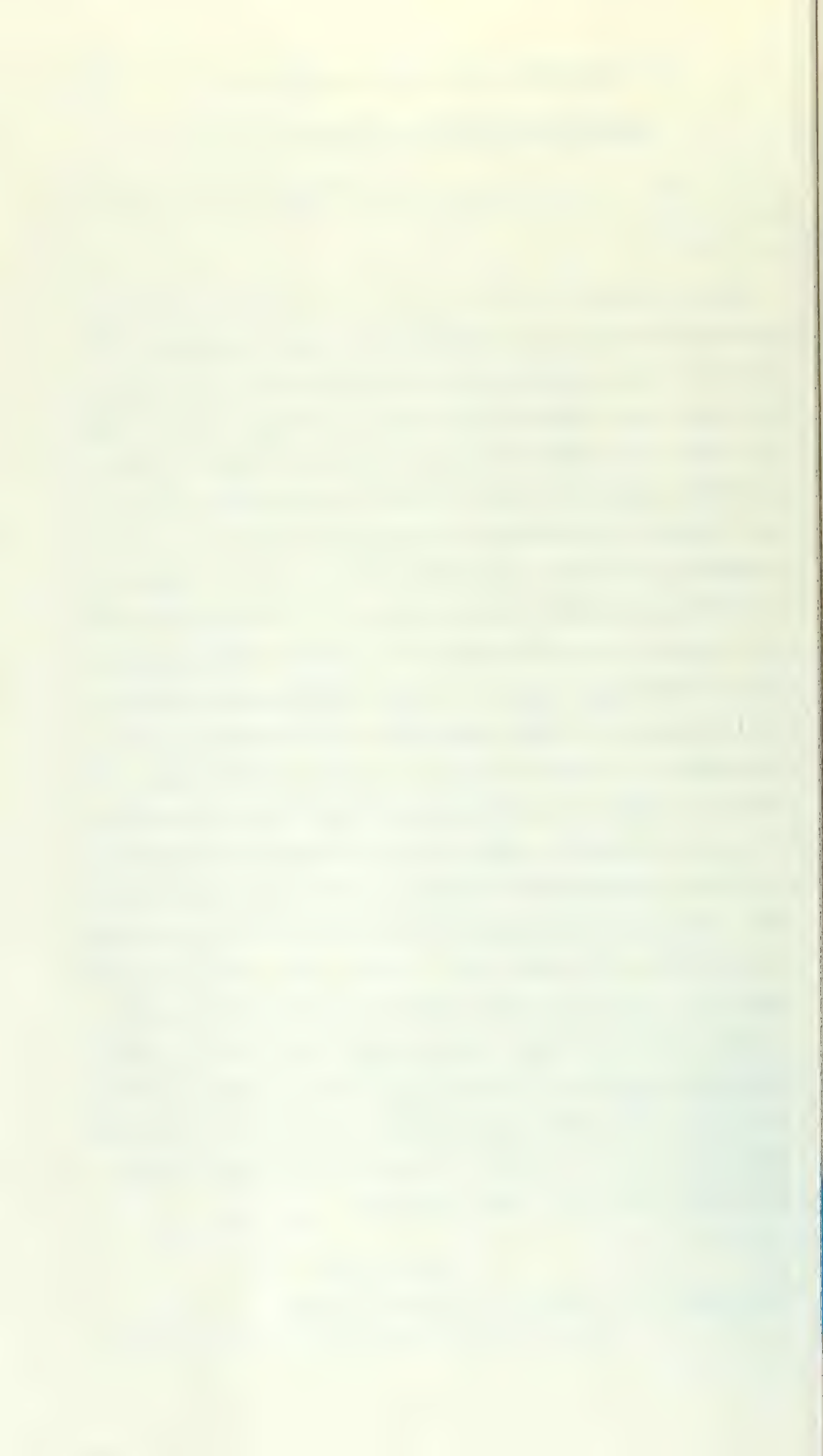
Dear Eric:

* * * *

When he first arrived and we sat down to discuss the situation he wanted to reduce expenses, I told him that was alright with me and explained to him why the expenses had been so high during the past several years. Before I go on I will explain the main reason to you. Under the Swedish-American Treaty, a national of Sweden who is a non-resident alien takes an income tax rate of 10% on securities and 30% on real estate BUT cannot take any capital losses. During the period of liquidation of the Hastings Trust we were taking tremendous Capital losses and the only way that Jan could take advantage of these losses was by establishing a place of business in America. This I did for him by maintaining the office in San Francisco (so far as I was concerned, I had no need for such an office but naturally used it) to put him in that classification. During these years Jan paid no income tax. On the other hand if I had gone along on the non-resident alien basis the tax on the Modesto property, alone, would have been \$3,600. per year. This past year, having sold the Modesto property, I had a lot of money to invest and maintained the office for that purpose.

* * * * *

Admitted in Evidence April 4, 1951.



Audit Report, December 31, 1942

JAN CASIMIR LEWENHAUPT

STATEMENT OF PROFIT AND LOSS BY PROPERTIES—JANUARY 1, 1942, TO DECEMBER 31, 1942

PROPERTY	Rental Income	Taxes	Insurance	Repairs and Maintenance	Interest	Total Ex- penses before Depreciation	Deprecia- tion	Total Expenses	Net Income
10th and J Streets, Modesto, Calif.....	\$13,200.00	\$	\$ 196.33	\$	\$ 1,225.08	\$ 1,421.41	\$ 1,052.97	\$ 2,474.38	\$10,725.62
1786-90 San Jose Ave., San Francisco, Calif.....	1,575.00	238.55	157.73	9.00		405.28	1,236.89	1,642.17	*67.17
251-259 Highland Ave., Burlingame, Calif.....	457.50	223.81	35.36	189.20		448.37	316.72	765.09	*307.59
	<u>\$15,232.50</u>	<u>\$462.36</u>	<u>\$ 389.42</u>	<u>\$ 198.20</u>	<u>\$ 1,225.08</u>	<u>\$ 2,275.06</u>	<u>\$ 2,606.58</u>	<u>\$ 4,881.64</u>	
									<u>\$10,350.86</u>

* Figures circled in red.

OTHER INCOME:

Interest:

Savings Banks \$ 56.74

Bonds:

Illinois Power 150.00

Pacific Gas & Electric..... 140.00

290.00

Stock Dividends:

National Distillers Corporation.....\$ 100.00

Pacific Gas & Electric Co..... 200.00

300.00

646.74

\$10,997.60

EXPENSES:

Miscellaneous insurance \$ 4.83

Agent's Salary 2,400.00

Office Salaries 440.00

Rent 635.00

Telephone and telegraph..... 11.15

Other expense 419.76

Social security taxes..... 5.06

New Jersey property taxes..... 13.00

Annuity to Flora Adele Gibson..... 600.00

4,528.80

\$ 6,468.80

OTHER INCOME CREDITS:

Estate of Ella Hastings, Deceased—Partial distribution..... \$14,000.00

Fiduciaries:

Hastings Trust Estate.....\$ 5,911.35

Hastings Estate Properties 1,760.35

7,671.70

21,671.70

NET INCOME.....

\$28,140.50



RESPONDENT'S EXHIBIT Q

Audit Report, December 31, 1943

JAN CASIMIR LEWENHAUPT

INCOME STATEMENT—JANUARY 1 to DECEMBER 31, 1943

Income:

Securities:

Interest	\$ 190.00	
Dividends	1,812.50	\$2,002.50

Property rentals—Schedule 2....	9,865.26
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Income distributions:

Hastings Estate	\$ 86.00	
Hastings Estate Properties....	4,031.87	4,117.87

Interest on bank deposit.....	14.84
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Gross Income	\$16,000.47
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Expense:

Trustee's fee	\$2,790.00	
Legal fees	2,500.00	
Rent	600.00	
Insurance	279.67	
Donations	235.17	
Telephone and telegraph.....	99.48	
Auditing	90.00	
Automobile	60.00	
Commission on bank drafts.....	32.08	
Real estate survey.....	30.00	
Office supplies	19.35	
Stenographic services	15.00	
Taxes	14.34	
Notary fees	9.00	
Postage	5.00	
Safe deposit box rent.....	4.00	\$ 6,783.09

	\$ 9,217.38
--	-------------

Annuity—Flora Gibson	600.00
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Net Income (exclusive of principal distributions by Hastings Estate Properties)\$ 8,617.38

Principal:

Distributions by Hastings Estate Properties, representing proceeds from sales of properties allocable to Jan Casimir Lewenhaupt 14,545.83

Net Income and Distributive Share of Principal.....\$23,163.21

Admitted in Evidence April 4, 1951.

RESPONDENT'S EXHIBIT R

Report on Examination, December 31, 1944

JAN CASIMIR LEWENHAUPT INCOME STATEMENT—YEAR 1944

Income:

Securities

Interest\$ 47.45
Dividends 3,550.00 \$ 3,597.45

Property rentals 10,394.00
Hastings Estate Properties 2,855.12
Interest on bank deposit..... 22.42

Total income\$16,868.99

Expense:

Agent's fee\$4,021.63
Rent 600.00
Contributions 258.00
Insurance 244.74
Legal fees 116.49
Audit fee 90.00
Commission and cable charges..... 96.14
Telephone and telegraph..... 38.82
Office expense 45.49
Taxes 24.72

\$ 5,536.03

Total expenses\$11,332.96

Other deductions:

Annuity payments, Flora Adele Gibson.....	\$ 600.00
Federal taxes on income, prior years.....	132.48
Net loss on sales of securities and real estate	71.67

Total other deductions.....	\$ 804.15
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Net income—Exhibit A.....	\$10,528.81
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Admitted in Evidence April 4, 1951.

RESPONDENT'S EXHIBIT S

Report of Examination December 31, 1945

JAN CASIMIR LEWENHAUPT

INCOME STATEMENT—YEAR ENDED DECEMBER 31, 1945

Income:	Hastings	Lewenhaupt	Combined
Rentals	\$ 611.77	\$11,244.15	\$11,855.92
Dividends	6,115.00	1,350.00	7,465.00
Gain on sale of securities	9,243.69	6,867.93	16,111.62
Hastings Estate Properties	133.33	.....	133.33
Interest .....	.....	7.55	7.55
Total income	\$16,103.79	\$19,469.63	\$35,573.42

Expense:

Agent's fee	\$ 5,800.00
Insurance	222.77
Contributions and gifts	231.00
Bank commission and cable fees.....	65.82
Audit fee	67.50
Dues	46.00
Telephone and telegraph.....	14.60
Supplies	17.32
Taxes	14.40
Postage, notary fees, safe deposit box....	18.45

Total expense	\$ 6,497.86
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Net Operating Income.....	\$29,075.56
Annuity Payments, Flora Adele Gibson.....	600.00
	<hr/>
	\$28,475.56
Taxes on Income:	
State of California income tax.....	\$ 707.87
Federal income taxes:	
Prior years	\$ 193.06
Calendar year 1945.....	5,471.02 5,664.08
	<hr/>
Total taxes on income	\$ 6,371.95
	<hr/>
Net Income to Exhibit A.....	\$22,103.61

Admitted in Evidence April 4, 1951.

RESPONDENT'S EXHIBIT JJ

E. C. LaMontagne
3393 El Camino Real
Atherton, P.O. Menlo Park, Calif.

Nov. 22nd. 1946

Dear Eric:

* * * * *

I have had several lengthy discussions with Jan and I find him very desirous of reducing the Administration expenses. This is satisfactory with me but it will necessitate the giving up of our office in San Francisco and my taking a desk space wherever I can find one. He has requested that the expenses be reduced from \$6,000. per year to \$4,500. I have maintained the S. F. office practically entirely for the benefit of his business as I do not need one for my personal affairs, which are mainly

in the country, and the monthly expenses have averaged about \$100. per month. The other expenses, which brought the total up to \$500. per month were as follows; my fee of \$350. for bookkeeping \$75. It is his idea that because so much of the money is invested in stocks that the amount of work is not as great and therefore should not be as great a cost. This, on the surface, is perfectly correct but what I have been unable to impress upon him is the responsibility involved. The combined assets of the Hastings and Lewenhaupt properties is around \$400,000.00, not a small amount in any country. * * *

* * * * *

I am, very sincerely,

/s/ CLINTON

Admitted in Evidence April 4, 1951.

RESPONDENT'S EXHIBIT LL

September 17th, 1946

Dear Eric:

I have just received your letter dated the 11th.

I assure you that I had no intention of being casual in my remark that "the accountant will give you a full explanation". I had just returned to the office, had not been able to reach the accountant to discuss the situation with him but wanted to get a reply off to you as quickly as possible. I, further, want to assure you that none of my activities, either personal or in behalf of Jan, are casual. That hap-

pens to be one of my greatest difficulties, everything I do is very intense and only done after a great deal of thought and consideration. If you will explore this statement of mine a little further you will realize that I was unable to give you a definite statement from the accountant, as I had been unable to talk with him, and therefore, did not wish to complicate any explanation that he might have written you.

At this time let me explain our accountants. All certified public accountants are "Tax Experts", some are better than other, and I have felt that ours was one of the more aggressive and competent ones. For many years, the Hastings Estate and Bill Lange employed an old firm of accountant that, in my opinion, were very poor. They constantly made errors and would not keep up with the times. During the war it was very difficult to get any other firm of accountants to take on a new account and I had to play along with this incompetent outfit until such time as I was able to make a change. Mr. Carson and Mr. Harms are both men in their early forties and very experienced, aggressive and competent. Neither are Tax lawyers but have had a great deal of experience with tax claims, for and against the government. We have, each year, discussed the Income Tax situation, the new laws and rulings and I have had them explore each and every loophole to reduce Jan income tax. The Record of Income Tax payments I have made for Jan account are listed below:

1941—No tax paid.

1942—\$1,541.77.

1943—No tax paid.

1944—No tax paid.

1945—\$5,471.02 Federal, \$707.87 Calif. State.

In addition to the above there was an adjustment made by the Federal Government and we paid an additional \$46.57 for 1942, \$225.21 for 1941.

If we had not explored all the angles of taxation for the year 1945, our tax bill would have been many times higher than the one paid.

Back in 1941 I set up, in my statement to you, an account for Federal and State income taxes. Some of the time I set aside \$500. per month and others \$350. per month, however, when it was apparent that we would not be paying income taxes for awhile, due to losses taken in the Hastings Estate account, I discontinued setting aside any funds to meet this need and have carried this money for that purpose, ever since, at least until this year when this fund was used to pay this last tax.

I am quite certain that no other firm of Tax Experts could have done any better. I have found that in the income tax statement filed for 1945, Mr. Carson has set up as part of the income income "Dividends" \$7,465.00 and the tax paid on that amount was \$746.50 or ten per cent. The balance of the income \$15,781.39 (Gross amount) was from rents and under the present law this is subject to a tax of 30%, therefore, 30% of the above amount was \$4,724.52 plus the 10% on the income from

stocks of \$746.50 totaled \$5,471.02. There was no tax paid on any "Capital Gains".

* * * * *

At the time I purchased the San Mateo property I wrote you explaining that I would not get possession of the property until after first of the year. This was on account of income tax matters by the sellers. I have only put up \$13,000. and will pay the balance when the deed is recorded. In the meantime I am receiving a credit on the purchase price of interest at 5% from the time it was put up until the deal is closed. This is the reason that I stated "when San Mateo starts producing".

It was my intention, as stated in my letter Sept. 3rd. that when all the funds were earning that the income would be around \$18,500. per year after all (that means everything, taxes, administration but not including unforeseen repairs etc.) expenses have been paid. There cannot be any additional administration expenses, unless our rent goes up again but there can be higher taxes and this is something that we have no control over.

I am constantly on the lookout for favorable real estate but so far have not been able to find anything that I like. This does not mean that we will not find it but only that nothing has been found that I feel is good enough and safe enough. I will let you know immediately when I find something.

* * * * *

Please excuse me as I overlooked a sentence in the first paragraph on the second page of your letter regarding the "net income from San Mateo".

This means the gross income less taxes and insurance. I have, naturally, no way of knowing what other expenses, such as repairs etc. might be and that is the accepted method of stating a "net income".

* * * * *

Admitted in Evidence April 4, 1951.

RESPONDENT'S EXHIBIT PP

Form 1040 NB-a—Treasury Department, Internal Revenue Service.

[Written in longhand]: No chg. 44 Allique—RAR 42-41-39.

Serial No. 6-350089. First Payment: \$5,471.02.

United States

1945

Nonresident Alien Income Tax Return

For a Nonresident Alien (other than a resident of Canada) not engaged in trade or business within the United States whose gross income from sources within the United States was more than \$15,400.

For Calendar Year 1945 or fiscal year beginning, 1945, and ending, 1946.

To be filed with the Collector of Internal Revenue, Baltimore 2, Maryland, not later than the 15th day of the 6th month following the close of your taxable year.

Name: Jan Casimir Lewenhaupt, 369 Pine St., San Francisco, California.

[Stamped]: Jun 1946. * * * * *

Admitted in Evidence April 17, 1951.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Promulgated April 23, 1953.

Petitioner, a citizen and resident of Sweden during the taxable year 1946, realized capital gain from the sale in 1946 of real property located in the United States. Held, that the treatment for tax purposes of gains derived from the sale of real property located in the United States is governed by article V of the tax convention between the United States and Sweden and that the provisions of article IX of the tax convention do not apply. Held, further, that petitioner was engaged in business within the United States during 1946, and, therefore, is taxable on the capital gain by virtue of the provisions of section 211 (b), I.R.C.

Samuel Taylor, Esq., and Walter G. Schwartz, Esq., for the petitioner.

Leonard A. Marcussen, Esq., for the respondent.

The Commissioner has determined a deficiency in income tax for the year 1946 in the amount of \$33,820.20. The petitioner contests the entire deficiency and claims overpayment of tax in the amount of \$4,345.95. He was a citizen and resident of Sweden during and before the taxable year.

The deficiency results principally from the inclusion in the petitioner's gross income of a long term capital gain in the amount of \$152,555.87, realized upon the sale of real property located in

the United States. Petitioner claims that the capital gain is not taxable. Other adjustments made by the Commissioner have been settled by the stipulation of the parties which will be given effect under Rule 50.

The issues presented for decision are:

(1) Whether the provisions of article IX of the tax convention between the United States and Sweden are applicable to a capital gain derived from the sale in 1946 of real property situated in the United States by a citizen and resident of Sweden.

(2) If the first issue is decided for the respondent, a further question is presented, whether the petitioner, during the taxable year, was engaged in trade or business within the United States. If this question is decided affirmatively, it follows that the capital gain is taxable by reason of the provisions of section 211 (b) of the Internal Revenue Code.

FINDINGS OF FACT

The facts which have been stipulated are found as facts. The written stipulations of facts together with the attached exhibits, and the oral stipulations of facts are incorporated herein by this reference.

Petitioner's income tax return for the calendar year 1946 was filed with the collector for the district of Maryland. The return was filed on the basis that petitioner was a nonresident alien of the United States not engaged in trade or business in the United States.

Petitioner's full name is Jan Casimir Eric Emil Lewenhaupt. He is a Swedish Count. He was born on April 1, 1916. From the date of his birth to November 1948 he was a nonresident alien and a resident and citizen of the Kingdom of Sweden. Petitioner became a resident of the United States in November 1948. The petitioner was physically present in the United States during the calendar year 1946 only from November 20, 1946 to December 20, 1946. At no time prior to November 1948 did the petitioner perform any personal services within the United States. From 1941 through 1946, except for the periods during which he was in the Swedish Army, petitioner was engaged in the importing and exporting business in Sweden. During World War II, petitioner spent several periods in the Swedish Army, and for a portion of this time his regiment was located on the Northern border of Sweden, an isolated location with which communication was difficult. From about 1939 through 1945, petitioner was unable to leave Sweden to come to the United States. During the Russo-Finnish War, petitioner served as a volunteer in the Finnish Army. Petitioner owned no real estate in Europe in 1946 or in any of the years prior thereto.

In 1874, petitioner's great-grandfather, Serranus Clinton Hastings, the first Chief Justice of California, created an inter vivos trust for the benefit of himself, his wife and their descendants. This trust, sometimes hereinafter referred to as the Hastings trust, terminated on June 2, 1942 when

the last of the children of Judge Hastings died. At the time that this trust terminated, Clinton LaMontagne was the trustee. From June 2, 1942 to March 31, 1945, inclusive, LaMontagne acted as referee in the partition of the corpus of the trust. The corpus was liquidated and distributed to the remaindermen in cash. The last of the distributions of corpus was made on or before March 31, 1945.

Prior to the calendar year 1941, petitioner owned no real or personal property in the United States. He was, however, the beneficiary of a trust established under the will of his mother, Azelea Caroline Lewenhaupt, hereinafter sometimes referred to as the Lewenhaupt trust, the corpus of which comprised four parcels of real property and securities in the United States. Petitioner's mother died in 1925. Under the provisions of the trust established by her will, the petitioner received the income therefrom until he attained the age of 25, at which time the trust terminated and the corpus was distributed to him. Petitioner attained the age of 25 years on April 1, 1941.

On January 28, 1941, the petitioner appointed LaMontagne, who was a resident of California, as his agent for the purpose of managing the personal and real property petitioner was to receive upon distribution of the assets of the Hastings and of the Lewenhaupt trusts. LaMontagne was a second cousin of the petitioner and had been a trustee of the Hastings trust. The power of attorney dated January 28, 1941, executed by the petitioner in

favor of LaMontagne conferred broad general powers on LaMontagne to manage petitioner's affairs and property in the United States, including the power to buy and sell real estate and securities, and "to do and transact all and every kind of business of what nature and kind soever" for and in the name of the petitioner. On the same date, the petitioner executed a power of attorney with identical provisions in favor of his father, Count Eric Audley Hall Lewenhaupt, who at all times material hereto was a resident of Great Britain.

Petitioner gave LaMontagne a broad power of attorney so that he might be able to act for him in case both Sweden and the United Kingdom were cut off from the United States and so that he would have sufficient power to handle petitioner's funds should the funds of Swedish nationals be frozen in the United States. The funds of Norwegian and Danish nationals in the United States were frozen on April 10, 1940. The funds of Swedish nationals in the United States were frozen on June 14, 1941. Petitioner gave his father a power of attorney because it was feared that Sweden might be invaded or cut off from contact with the United States and England, so that he could no longer communicate with his father in England or with LaMontagne in the United States.

From 1945 to the time of the trial of this proceeding, LaMontagne has been a real estate broker, licensed under the laws of California, and he has been engaged full time in the business of real estate brokerage and property management. He con-

ducted this business from an office which he maintained at 369 Pine Street, in San Francisco during 1946, as well as before that year; and during 1946, he maintained, also, an office at his home in Atherton, a suburb of San Francisco. Prior to 1945 the petitioner paid LaMontagne a fee for his services plus an amount to cover part of his office expense in San Francisco. In 1945 and 1946 LaMontagne received from the petitioner an increased fee for his services but no separate sum as reimbursement for office expense. His compensation for 1946 was in the amount of \$7,580.

It was understood among petitioner, his father and LaMontagne, that LaMontagne was to take no important action regarding petitioner's United States property, such as purchasing and selling real estate, without first consulting either petitioner or petitioner's father. Prior to taking any major action with respect to petitioner's property in the United States, LaMontagne would consult with petitioner's father and, where practicable, with petitioner. Prior to selling petitioner's Modesto real property, referred to hereinafter, LaMontagne sought and received Count Eric Lewenhaupt's approval of the proposed sale. LaMontagne corresponded frequently with Count Eric Lewenhaupt. They corresponded about once or twice a week during the period from April 1, 1941 to December 31, 1946, inclusive. LaMontagne furnished petitioner's father with monthly reports of petitioner's United States properties. Petitioner frequently corresponded with his father regarding his properties in the United States.

The power of attorney given LaMontagne was revoked by the petitioner effective December 31, 1946.

LaMontagne, in the management of petitioner's properties, inter alia, executed leases, rented properties, collected the rents, kept books of account, paid taxes and mortgage interest, insured the properties, executed an option to purchase the El Camino Real property (referred to hereinafter), executed the sale of the Modesto property, and supervised repairs.

All of the income from petitioner's United States real property and securities, after payment of the expenses thereof, was transmitted to petitioner and his father.

The petitioner at one time or another during the calendar year 1946 held legal title to and owned only the following real property situated in the United States.

(a) Lots 29, 30, 31 and 32 in Block 68, 10th and J Streets, Modesto, California, hereinafter referred to as "the Modesto property."

(b) 1786-90 San Jose Avenue, San Francisco, California, hereinafter referred to as "the San Jose Ave. property."

(c) 679-85 Sutter Street, San Francisco, California, hereinafter referred to as "the Sutter St. property."

(d) 114 West Poplar Avenue, San Mateo, California, hereinafter referred to as "the West Poplar property."

The approximate fair market values of the United States real properties owned by petitioner in 1946 were as follows:

Modesto Property	\$240,000.00
Sutter Street Property.....	75,000.00
San Jose Avenue Property....	22,000.00

The Modesto property consisted of a single structure containing several stores. This property was acquired by petitioner on April 1, 1941 upon termination of the Lewenhaupt trust created for his benefit under the Will of his mother. The property was encumbered by a mortgage in the amount of \$24,500. On January 12, 1938, while it comprised a part of the corpus of the Lewenhaupt trust, the Modesto property was leased to the Stelling Leasehold Corporation, a California corporation (the name of which was later changed to the Stelling Properties Corporation), for a 50-year term commencing January 1, 1938. On January 12, 1938, petitioner executed an agreement, in which, as beneficiary of the trust, he undertook to be bound by the lease. On December 20, 1945, petitioner through LaMontagne entered into an agreement with the Stelling Properties Corporation for the sale of the Modesto property to that corporation. LaMontagne communicated with petitioner's father before making the agreement and secured his approval thereof. Legal title to the Modesto property was transferred to the Stelling Properties Corporation on January 23, 1946. The long-term capital gain from the sale of the Modesto property was

\$152,555.87 computed as follows:

Net Selling Price	\$238,903.40
Basis of Improvements.....	\$52,648.50
Depreciation Allowable....	20,155.47

Adjusted Basis	\$32,493.03
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Basis of Land.....	53,854.50
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Total Basis	86,347.53
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Long-Term Capital Gain	\$152,555.87
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The lease on the Modesto property was a so-called "net lease" under which the lessee paid all property taxes, all charges for utilities, all insurance; made all repairs, and took care of maintenance. Also, the lessee had the right to make alterations, additions, and improvements, and he was permitted to sublease the property. Petitioner, accordingly, did not pay taxes, insurance, utilities charges, or expenses of maintenance, repairs, or janitor services.

Petitioner through LaMontagne regularly made payments of interest upon the \$24,500 mortgage on the Modesto property, but he made no payment of principal until the date of the sale of that property. Petitioner through LaMontagne paid the mortgage in full upon the date of the sale of the property.

Petitioner is entitled to an additional deduction for depreciation for the calendar year 1946 in the amount of \$66.35 rather than the \$175.50 additional allowance made by the Commissioner's notice of deficiency.

The property at 1786-90 San Jose Avenue, San

Francisco, consisted of a single structure containing three stores. Petitioner through LaMontagne acquired this property on October 24, 1941 in exchange for a parcel of real property acquired upon the termination in 1941 of the trust created under his mother's will. During 1946, all three stores were leased to various tenants under leases with terms of three years or more. On March 1, 1945, petitioner through LaMontagne leased the store at 1788 San Jose Avenue to a tenant on a month-to-month basis. This lease was operative from March 15, 1945 through February 28, 1946. A new lease was entered into with the same lessee on February 1, 1946, to be effective for a 3-year term commencing March 1, 1946. The lessee used this store as an electrical repair and radio shop. The store at 1786 San Jose Avenue was leased to a tenant from at least November 1941 through February 28, 1949, and was used as a beauty shop. On January 31, 1946, petitioner through LaMontagne leased this store to the same tenant to be effective for a 3-year term commencing February 1, 1946. The store at 1790 San Jose Avenue was leased to a tenant from at least November 1941 through December 1948 for use as a restaurant and tavern. The lease in effect during 1946 was for a three year and four month term. All of the leases in effect during 1946 provided that the tenants would pay all utility bills and would make certain repairs at their own expense, except repairs of heating, roof, walls, and other outside repairs.

Petitioner through LaMontagne purchased the

real property at 679-85 Sutter Street, San Francisco, on December 3, 1945 at a cost of \$79,645.36. This property comprised a building containing two stores and ten studios (which studios were leased as a unit). On October 10, 1945, prior to the purchase of this property by the petitioner through LaMontagne, the store at 679 Sutter Street had been leased by its then owner for a 3-year term for use as a cocktail lounge commencing October 1, 1945 and ending September 30, 1948. Under this lease, the monthly rental was \$300, or seven per cent of the gross receipts of the business, whichever was larger. The petitioner, or his agents, were authorized to examine the lessee's books of account in order to check upon the amount of rent due. On December 27, 1945, the petitioner through LaMontagne leased the store at 681 Sutter Street for a 3-year term commencing January 1, 1946 for use as a ladies tailor shop. The remaining portion of the Sutter Street property, 683-5 Sutter Street, consisted of ten studios and a basement, which were leased as a unit. On December 27, 1945, petitioner through LaMontagne leased this portion of the property to a tenant for a 3-year term commencing January 1, 1946. The lessee was specifically granted the power to sub-lease any and all of the studios. This lease was in effect through December 31, 1949. All these leases provided that the lessees should pay all utilities charges and some expenses of repairs, except repairs of heating, roof, wall, and other outside repairs.

On December 18, 1946, petitioner became the

owner of real property located at 114 West Poplar Avenue, San Mateo, California, hereinafter referred to as the "West Poplar property". The cost of this property was \$29,500.00, and included the assumption of a mortgage in the amount of \$16,211.31. The improvements thereon comprised a residence. The property was vacant from December 18, 1946 to December 31, 1946, inclusive. During the calendar year 1947, the property was leased to a tenant on a month-to-month basis.

There was no mortgage or other indebtedness upon any of the real properties owned by the petitioner during the calendar year 1946 except the mortgage indebtedness on the Modesto and West Poplar properties referred to above.

Petitioner neither paid for nor furnished any janitorial services or utilities for any of the United States real properties owned by him during any of the calendar years 1942 through 1947.

The gross rentals received by petitioner from his United States real properties during the calendar year 1946, and the expenses thereof during 1946, were as follows:

	Modesto	San Jose		
	Property	Avenue	Sutter St.	Total
	Property	Property	Property	
Gross Rentals	\$843.31	\$2,093.00	\$8,705.99	\$11,642.30
Taxes	.....	277.66	2,541.02	2,818.68
Insurance	.....	106.01	472.24	578.25
Maintenance and				
Repair	.....	56.09	3,073.15	3,129.24
Interest	94.38	.....	.....	94.38
Depreciation	66.35	1,236.95	2,389.37	3,692.67
Net Rentals	682.58	416.29	230.21	1,329.08

On June 12, 1946, the petitioner through LaMontagne decided to purchase real property located at 100-104 South El Camino Real, San Mateo, California. This property is hereinafter referred to as "the El Camino Real property." On that date, he took an option upon said property, made a down payment of \$10,000.00 and paid a commission of \$3,375.00 thereon. On January 2, 1947, petitioner through LaMontagne exercised the option and acquired legal title to this property on that date. Petitioner neither received any rent nor paid nor incurred any expenses with regard to this property prior to January 1, 1947. The cost of this property was \$67,500.00. The improvements thereon comprised a single structure containing three stores. Prior to the acquisition of legal title to this property by petitioner, all three stores had been leased to different lessees by the then owner, each of said leases being for a 5-year term expiring on June 30, 1951. Petitioner still owned this property on December 31, 1947.

During the calendar year 1946, petitioner received dividends from United States sources in the amount of \$8,511.25 and received interest from United States sources in the amount of \$21.34. The parties have stipulated that under the provisions of Article VII of the Tax Convention between the United States and Sweden, United States income taxes on such dividends are limited to 10 per cent of the amount of such dividends.

During 1946, petitioner owned United States securities with an approximate valuation of \$100,-

000.00. Except for cash in the bank and a small amount of cash on hand, petitioner owned no other personal property in the United States during 1946.

LaMontagne, during the taxable year, devoted approximately 50 per cent of his time to the management of the petitioner's properties and to the conduct of his affairs in the United States.

The petitioner's activities during the taxable year connected with the ownership of real property located in the United States, and the management thereof through a resident agent, constituted engaging in a business during 1946 in the United States.

OPINION

Harron, Judge: Issue 1. The initial question is whether a capital gain from the sale in 1946 of real property situated in the United States by a citizen and resident of Sweden, is exempt from income tax by the United States under the provisions of Article IX of the tax convention for the avoidance of double taxation between the United States and Sweden.

Section 22 (b) (7) of the Internal Revenue Code excludes from gross income, "income of any kind, to the extent required by any treaty obligation of the United States."

Articles V and IX of the tax convention between the United States and Sweden, effective as of January 1, 1940, read as follows:

Article V.

Income of whatever nature derived from real property, including gains derived from the sale of

such property, but not including interest from mortgages or bonds secured by real property, shall be taxable only in the contracting State in which the real property is situated.

Article IX.

Gains derived in one of the contracting States from the sale or exchange of capital assets by a resident or a corporation or other entity of the other contracting State shall be exempt from taxation in the former State, provided such resident or corporation or other entity has no permanent establishment in the former State.

Article XXI of the tax convention authorizes the contracting states to "prescribe regulations necessary to interpret and carry out the provisions of this convention."

The Commissioner's regulations issued pursuant to the tax convention with Sweden are contained in T.D. 4975, C.B. 1940-2, p. 51. Sections 25.6 and 25.10 of the regulations which interpret the provisions of articles V and IX, respectively, of the convention are printed, in pertinent parts, in the margin.¹ Section 25.6 provides that income from real

¹Sec. 25.6. Income from real property—Income of whatever nature derived by a nonresident alien individual resident in Sweden * * * from real property situated in the United States, including gains derived from the sale of such property, is not exempt from taxation by the convention. The treatment of such income for taxation purposes is governed by those provisions of the Internal Revenue

property situated in the United States "including gains derived from the sale of such property" is not exempt from taxation by the United States under the convention, and that the treatment of such income for the purpose of taxation by the United States is governed by the provisions of the Internal Revenue Code (section 211) applicable generally to the taxation of nonresident aliens.² Section 25.10 excludes capital gains from the sale of real property situated in the United States from the provisions of article IX of the convention.

The petitioner contends that he had no "permanent establishment" in the United States during the taxable year and that the gain in question being derived from a capital asset is, therefore, exempt from tax by the United States under article IX of

Code applicable generally to the taxation of nonresident aliens* * *.

Sec. 25.10. Capital gains.—Under Article IX of the convention, gain derived from the sale or exchange of capital assets (other than real property) within the United States by a nonresident alien individual resident in Sweden * * * is exempt from Federal income tax unless such individual * * * has a permanent establishment in the United States. With respect to real property, see section 25.6 of these regulations.

² Prior to 1950 nonresident aliens not engaged in trade or business in the United States were taxed only on the amount of fixed or determinable annual or periodic income from sources within the United States. They were not taxed on any capital gains unless engaged in business in the United States. See section 211 of the Internal Revenue Code and Regulations 111, section 29.143-2.

the convention. He argues that the Commissioner's regulations are invalid in so far as they exclude capital gains from the sale of real property situated in the United States from the provisions of article IX of the convention. The petitioner takes the position that article V of the convention merely prohibits Sweden from taxing the gain in question and that "the intent of the Tax Convention was to exempt capital gains from the sale of real property from both Swedish and United States income taxes except where the seller had a permanent establishment in the United States." The respondent contends that the provisions of the regulations are in accord with the intent and purpose of the convention and are a reasonable interpretation of its provisions, and hence are valid. We agree with the respondent.

A tax convention or treaty is construed by the courts in the same manner as is a taxing statute. Where there is an inconsistency or conflict in the text of either, a clarifying regulation is not only appropriate but is to be given great weight by the courts. *Koshland vs. Helvering*, 298 U.S. 441, 446. And the regulation, if in harmony with the intent and purpose of the statute or tax convention and a reasonable interpretation of its provisions, is to be sustained.

In the instant case, there is a seeming inconsistency or conflict between the provisions of Articles V and IX of the tax convention with respect to the treatment to be accorded a capital gain from

the sale of real property, which is admittedly a capital asset. We are satisfied, from a review of the commentary on the draft of the tax convention, that the challenged provisions of the regulations are in accord with the intent and purpose of the convention, and are consistent with its provisions. See, Senate Executive Report No. 18, 76th Cong. 1st Sess. (1939).

The purpose of the tax convention is the avoidance of double taxation. It was not designed, as the petitioner urges here, to exempt a class of income from taxation by both of the contracting states. "The articles of the convention dealing with avoidance of double taxation cover the whole field of taxable income, each specific item of income being made subject to tax in one or the other of the two countries but not in both." Senate Executive Report *supra*, p. 17. Although not necessary to our decision, reference should be made to the fact that Sweden, unlike the United States, does not use citizenship as a basis for taxation. Article XIV of the convention³ was made the key provision by

³ Article XIV reads as follows:

"It is agreed that double taxation shall be avoided in the following manner:

(a) Notwithstanding any other provisions of this convention, the United States of America in determining the income and excess-profits taxes, including all surtaxes, of its citizens or residents or corporations, may include in the basis upon which such taxes are imposed all items of income taxable under the revenue laws of the United States of America as though this convention had not come into effect.

means of which most of the articles dealing with the avoidance of double taxation with respect to specific items of income were rendered possible. Senate Executive Report, *supra*, p. 11.

The Senate Executive Report, *supra*, in commenting on article IX of the draft, which covers gains from the sale or exchange of capital assets, makes no reference to gains from the sale or exchange of real property; the only class of property mentioned

The United States of America shall, however, deduct the amount of the taxes specified in Article I (b) (1) and (3) of this convention or other like taxes from the income tax thus computed but not in excess of that portion of the income tax liability which the taxpayer's net income taxable in Sweden bears to his entire net income.

(b) (1) Notwithstanding any other provision of this convention, Sweden, in determining the graduated tax on income and property of its residents or corporations or other entities, may include in the basis upon which such tax is imposed all items of income and property subject to such tax under the taxation laws of Sweden. Sweden shall, however, deduct from the tax so calculated that portion of such tax liability which the taxpayer's income and property exempt from taxation in Sweden under the provisions of this convention bears to his entire income and property.

(2) There shall also be allowed by Sweden from its national income and property tax a deduction offsetting the tax deducted at the source in the United States of America, amounting to not less than 5 per centum of the dividends from within the United States of America and subject to such tax in Sweden. It is agreed that the United States of America shall allow a similar credit against the United States income tax liability of citizens of Sweden residing in the United States of America."

is securities.⁴ The inference is reasonable and we think proper that the contracting states, having specifically provided in article V for the treatment for tax purposes of income and gain from the sale of real property, with the situs of the real property made the basis for taxation, did not intend that capital gains from the sale of real property should fall within the provisions of article IX, which ties the taxation of capital gains to a permanent establishment.

In any event, a review of the commentary on the proposed draft of the convention convinces us that no substantial change in the treatment for tax purposes by the United States of capital gains, whether derived from the sale of real property or from the sale of other capital assets situated in the United States by a citizen and resident of Sweden, was intended under the provisions of the convention. In this respect the provisions of articles V and IX of the convention dovetailed into our ex-

⁴Senate Executive Report No. 18, *supra*, p. 8:

“Article IX, as already noticed, ties the taxation of capital gains to a permanent establishment. If, for example, a Swedish corporation has no permanent establishment in the United States and sells securities on the New York Stock Exchange, the resultant gains, if any, are not taxable under * * * this article. This principle is in accord with our existing law under which a corporation falling within the provisions of section 231 (a) or a non-resident alien falling within the provisions of section 211 (a), is not subject to tax on the gain derived from the sale or exchange of securities through a resident broker, commission agent, or custodian.”

isting laws. Senate Executive Report, *supra*, pp. 7, 8. Under our laws in effect when the convention was ratified, the taxability by the United States of capital gains derived by a nonresident alien from sources within the United States depended on whether the nonresident alien had a "United States business or office," i.e., was engaged in trade or business within the United States. See section 211 of the Internal Revenue Code as it read prior to amendments made by the Revenue Act of 1950. The meaning of the term "permanent establishment" as used in the convention is substantially identical with the meaning of the words "United States business or office" as used in section 211 (b) of the Code. Senate Executive Report, *supra*, p. 7. Hence the same test for determining the taxability by the United States of a capital gain derived from the sale by a citizen and resident of Sweden of real property situated in the United States is applicable even if the provisions of article IX of the convention were construed as embracing gains from the sale of real property. Viewed in this light, the seeming conflict in the text of the convention between the provisions of articles V and IX is dispelled.

We conclude that the Commissioner's regulations issued pursuant to the tax convention with Sweden, in so far as they reflect the treatment for tax purposes by the United States of gains derived from the sale of real property situated in the United States, are valid. We therefore hold that the gain derived from the sale in 1946 of real property

situated in the United States by the petitioner is not exempt from income tax by the United States under the provisions of article IX of the tax convention with Sweden.

Issue 2. The remaining issue is whether the petitioner, during the taxable year, was engaged in trade or business in the United States within the meaning of section 211 (b) of the Internal Revenue Code. If the petitioner was so engaged the capital gain in question is taxable under the provisions of section 117 of the Internal Revenue Code. Section 211 (b) of the Code, which is printed in the margin,⁵ provides that nonresident aliens who are

Sec. 211. Tax on Nonresident Alien Individuals.
* * * * *

(b) United States Business or Office.—A nonresident alien individual engaged in trade or business in the United States shall be taxable without regard to the provisions of subsection (a). As used in this section, section 119, section 143, section 144, and section 231, the phrase “engaged in trade or business within the United States” includes the performance of personal services within the United States at any time within the taxable year, but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of ninety days during the taxable year and whose compensation for such services does not exceed in the aggregate \$3,000. Such phrase does not include the effecting, through a resident broker, commission agent, or custodian, of transactions in the United States in commodities * * * or in stocks or securities.

engaged in a trade or business in the United States are taxable in the same manner as citizens of the United States with respect to income derived from sources within the United States.

The issue here is whether the petitioner's activities with respect to certain parcels of improved real estate constituted engaging in a trade or business. The petitioner, during the taxable year, did not trade in, or realize gain from the sale or exchange of, securities or commodities. At the beginning of the taxable year, the petitioner owned United States securities of an approximate value of \$100,000.00. His only security transactions during the taxable year were the purchase of additional securities with part of the proceeds from the sale of the Modesto real property, which gave rise to the capital gain in question. The respondent's argument on brief that petitioner failed to show that his security transactions did not constitute engaging in business is without merit. See *Higgins vs. Commissioner*, 312 U.S. 212; *Evelyn M. L. Neill*, 46 B.T.A. 197.

Whether the activities of a nonresident alien constitute engaging in a trade or business in the United States, is, in each instance, a question of fact. The evidence and record before us establishes, and we have found as a fact, that the petitioner's activities during the taxable year connected with his ownership, and the management through a resident agent, of real property situated in the United States constituted engaging in a business. The pe-

tioner, prior to and during the taxable year, employed LaMontagne as his resident agent who, under a broad power of attorney which included the power to buy, sell, lease and mortgage real estate for and in the name of the petitioner, managed the petitioner's real properties and other financial affairs in this country. The petitioner, during all or a part of the taxable year, owned three parcels of improved, commercial real estate. The approximate aggregate fair market value of the three properties was \$337,000. In addition, the petitioner purchased a residential property, and through his agent, LaMontagne, acquired an option to purchase a fourth parcel of commercial property, herein referred to as the El Camino Real property, at a cost of \$67,500. The option was exercised and title to the property conveyed to the petitioner in January 1947.

LaMontagne's activities, during the taxable year, in the management and operation of petitioner's real properties included the following: executing leases and renting the properties, collecting the rents, keeping books of account, supervising any necessary repairs to the properties, paying taxes and mortgage interest, insuring the properties, executing an option to purchase the El Camino Real property, and executing the sale of the Modesto property. In addition, the agent conducted a regular correspondence with the petitioner's father in England who held a power of attorney from petitioner identical with that given to LaMontagne; he submitted monthly reports to the petitioner's

father; and he advised him of prospective and advantageous sales or purchases of property.

The aforementioned activities, carried on in the petitioner's behalf by his agent, are beyond the scope of mere ownership of real property, or the receipt of income from real property. The activities were considerable, continuous and regular and, in our opinion, constituted engaging in a business within the meaning of section 211 (b) of the Code. See *Pinchot vs. Commissioner*, 113 F. 2d 718.

Evelyn M. L. Neill, *supra*, and other authorities relied on by the petitioner, are distinguishable on the facts from this proceeding. The decisions of state courts cited by the petitioner defining what constitutes engaging in a trade or business under various state laws are not persuasive here. *Pinchot vs. Commissioner*, *supra*.

We hold that the petitioner, during the taxable year, was engaged in a trade or business, and that his income from sources within the United States is taxable under section 211 (b) of the Code.

Reviewed by the Court.

Decision will be entered under Rule 50.

The Tax Court of the United States
Washington

Docket No. 24042

JAN CASIMIR LEWENHAUPT, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determinations of the Court in its Findings of Fact and Opinion promulgated on April 23, 1953, the respondent has filed recomputation of petitioner's income tax liability for the year 1946, under Rule 50, with which the petitioner agrees. Accordingly, it is

Ordered and Decided: That there is a deficiency in Federal income tax for the year 1946 in the amount of \$33,793.02.

/s/ MARION J. HARRON,
Judge.

Entered: June 12, 1953.

The United States Court of Appeals
For the Ninth Circuit

Tax Court Docket No. 24042

JAN CASIMIR LEWENHAUPT, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW BY THE UNITED
STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

Jan Casimir Lewenhaupt respectfully petitions this Honorable Court to review the decision of The Tax Court of the United States entered in the above-entitled cause on June 12, 1953, determining a deficiency in Federal income taxes for the calendar year 1946 in the amount of \$33,793.02, and failing to determine an overpayment of said taxes for said calendar year in the amount of \$4,345.95.

I.—Jurisdiction

Petitioner is an individual who was a citizen and resident of Sweden during the calendar year 1946.

Petitioner filed his Federal income tax return for the calendar year 1946 with the Collector for the District of Maryland.

Pursuant to the provisions of Section 1141 (b) (2) of the Internal Revenue Code, it has been stipulated in writing between the petitioner and the

Commissioner of Internal Revenue, the respondent herein, that the aforesaid decision of The Tax Court of the United States may be reviewed by the United States Court of Appeals for the Ninth Circuit. A stipulation to this effect has been filed with The Tax Court and a copy thereof is attached hereto as Exhibit A and is incorporated by reference herein.

Jurisdiction of this Court to review the aforesaid decision of The Tax Court of the United States is founded on Sections 1141 and 1142 of the Internal Revenue Code.

II.—Nature of Controversy

The controversy herein involves the following issue, which was presented to the Tax Court:

1. Whether the long-term capital gain realized by the petitioner during the calendar year 1946 upon the sale of certain real property located in the United States is subject to United States income taxes. Exemption is claimed by the petitioner on two independent grounds. Petitioner maintains and respondent denies that:

(a) The gain in question is exempt from United States income taxes by the Tax Convention between the United States and Sweden and Section 22 (b) (7) of the Internal Revenue Code.

(b) The petitioner (who was admittedly a non-resident alien during the calendar year 1946) was not engaged in trade or business within the United States within the meaning of Section 211 of the Internal Revenue Code during the calendar year 1946, and that therefore the gain in question is not

subject to United States income taxes under Section 211 of the Internal Revenue Code.

Wherefore, the petitioner petitions that said findings of fact and opinion and decision of The Tax Court of the United States be reviewed by the United States Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said Court and be transmitted to the Clerk of the said Court for filing, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said Court.

/s/ SAMUEL TAYLOR

/s/ WALTER G. SCHWARTZ,

Counsel for Petitioner.

Duly Verified.

EXHIBIT A

STIPULATION RE: VENUE

It is hereby stipulated by and between counsel for the Petitioner and counsel for the Commissioner that the decision of the Tax Court in the above-entitled case may be reviewed by the Court of Appeals for the Ninth Circuit pursuant to Section 1141(b) (2) of the Internal Revenue Code.

Date: August 24, 1953.

/s/ SAMUEL TAYLOR,

/s/ WALTER G. SCHWARTZ,

Counsel for Petitioner

/s/ H. BRIAN HOLLAND,

Counsel for Respondent

[Endorsed]: T.C.U.S. Filed Sept. 8, 1953.

[Title of U.S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON REVIEW

To the Clerk of The Tax Court of the United
States, Washington, D.C.:

You will please prepare, transmit, and deliver to the Clerk of The United States Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review heretofore filed by the petitioner:

(1) The entire record, pleadings, docket entries, findings, decision and evidence in the proceedings of the above-entitled cause before the Tax Court.

(2) The petition for review.

(3) The notice of filing petition for review.

(4) This designation of contents of record on review.

Dated: September 4, 1953.

/s/ SAMUEL TAYLOR,
/s/ WALTER G. SCHWARTZ,
Counsel for Petitioner.

[Endorsed]: T.C.U.S. Filed Sept. 8, 1953.

The Tax Court of the United States
Washington

[Title of Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents 1 to 44 inclusive, constitute and are all of the original papers and proceedings, including joint exhibits (1-A through 10-J, 11 through 16, 18 through 22), admitted in evidence, and respondent's exhibits (K through MM, PP), admitted in evidence, but excepting joint exhibit (17) and respondent's exhibits (NN and OO) marked for Identification only, on file in my office as the original and complete record in the proceeding before The Tax Court of the United States in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States at Washington in the District of Columbia this 29th day of September, 1953.

[Seal]: /s/ VICTOR S. MERSCH,

Clerk, The Tax Court of the
United States.

The Tax Court of the United States

Docket No. 24042

JAN CASIMIR LEWENHAUPT, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

TRANSCRIPT OF PROCEEDINGS

U. S. Appraisers Building, Courtroom No. 421,
San Francisco, California, Monday, March 26, 1951.

(Met, pursuant to notice, at 10:00 a.m.)

Before: Hon. Marion J. Harron, Judge.

Appearances: Samuel Taylor, Esq., and Walter G. Schwartz, Esq., 351 California Street, San Francisco, California, appearing on behalf of the Petitioner. Leonard Allen Marcussen, Esq., (Hon. Charles Oliphant, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of the Respondent. [1*]

* * * * *

Thereupon,

RICHARD E. HOLL

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and your address.

* Page numbering appearing at the top of page of original Reporter's Transcript of Record.

(Testimony of Richard E. Holl.)

The Witness: Richard E. Holl, 177 Precita Avenue, San Francisco.

The Clerk: How do you spell your last name?

The Witness: H-o-l-l.

Direct Examination

Q. (By Mr. Taylor): Will you state your occupation, Mr. Holl?

A. I am First Vice President of Baldwin and Howell. [21]

Q. Where is the main office of Baldwin and Howell?

A. 318 Kearny Street, San Francisco.

Q. And in what business is your firm engaged?

A. Well, we are in the general real estate, property management, and insurance business.

Q. Do you buy, sell, and manage real estate throughout Northern California?

A. We do.

Q. And how long have you been engaged—has your firm been engaged—in that business?

A. Well, the firm was established in 1885.

Q. And what is its relative size and position among real estate firms?

A. We are one of the oldest and largest in Northern California.

Q. And how long have you yourself been engaged in the real estate business?

A. Since 1923 with Baldwin and Howell.

Q. With Baldwin and Howell?

A. Yes, sir.

(Testimony of Richard E. Holl.)

Q. Are you familiar with the property management business of your firm?

A. I am. I have been head of that department in my firm since 1940.

Q. And does the management of property constitute a [22] substantial part of the business of Baldwin and Howell? A. Yes, it does.

Q. And that has been true for many years?

A. I believe so. We have had a property management department for a good many years.

Q. Now, are you a member of any associations pertaining to the real estate business?

A. I am.

Q. Will you state what they are?

A. Well, the California Real Estate Association, the San Francisco Real Estate Board, of which I was a director in 1949 and 1950.

Q. Will you indicate the extent of your experience in buying and selling real estate?

A. Well, I have been engaged, as I said, in the business since 1923. I have personally handled, I imagine, in excess of \$6,000,000.00 or \$7,000,000.00 worth of property for clients of my own, in addition to what I handle for the office.

Q. You mean buying and selling?

A. Buying and selling, yes.

Q. Have you done any appraisal work?

A. I have. Since 1942, I have assisted Mr. George H. Thomas, Jr., our President, in various appraisals that he has made for the United States

(Testimony of Richard E. Holl.)

Maritime Commission, the Department [23] of Justice, the Navy, various government agencies.

Q. Then have you made any appraisals yourself?

A. I have made numerous appraisals for attorneys, eight or nine parcels in various estates.

Q. Will you state some of the estates which you have appraised?

A. The Estate of Alice R. Green, the Royal Anne Hotel property on Valencia Street, property at Octavia and Laguna Streets. I have the addresses, but not in front of me right now.

Q. A good many, in other words?

A. That is right.

Q. Are you familiar with the prevailing fair market values of real estate in San Francisco during the years from 1941 to the present?

A. I am.

Q. Did your firm ever act as agent and custodian for any real estate owned by Count Lewenhaupt, the Petitioner in this case?

A. We did, during the years 1947, 1948, and 1949.

Q. What did your firm charge the Count for this service?

A. \$30.00 a month.

Q. Will you state what properties you handled for that fee?

A. We handled three properties for the Count, one in [24] San Mateo at 100 to 108 El Camino Del Mar, and another piece.

Q. You mean El Camino Real?

A. Yes, El Camino Real.

(Testimony of Richard E. Holl.)

Q. That is the main highway south, isn't it?

A. That is right, and a building at, I believe the number is 1786 to 1790 San Jose Avenue; and 679 to 685 Sutter Street.

Q. And, for handling those properties, you charged the Count \$30.00 a month?

A. That is correct.

Q. Or \$360.00 a year? A. Correct.

Q. Will you state how you reached that fee or that charge?

A. Well, those fees are established by the San Francisco Real Estate Board on a minimum basis, depending of course what work is involved, but the fees run from 2 to 5 per cent of the gross monthly income.

In this case, there was very little to do. The stores were all leased, and it was just a matter of collecting the rentals, so we put the minimum of $2\frac{1}{2}$ per cent of the gross receipts, in round figures, \$30.00 a month.

Q. You say that is a standard fee of the San Francisco Real Estate Board?

A. That is correct. [25]

Q. Is that the fee where there are no utilities, janitorial services furnished by the landlord?

A. That is correct.

Q. How long has that been the standard fee?

Mr. Marcussen: Just a moment. Respondent objects to the statement that the standard fee was $2\frac{1}{2}$ per cent. I would like to have the witness clarify that. He said that the standard fees varied

(Testimony of Richard E. Holl.)

from 2 to 5 per cent. I don't understand it to be his testimony that $2\frac{1}{2}$ per cent is the standard fee for doing work that this witness' company did. I would like to have that clarified.

The Witness: As I stated, the minimum fee runs from 2 to 5 per cent, depending on the amount of work involved and, in this particular instance, I stated that our fee, due to the fact that there was no particular work involved except collecting the rentals, that we had established a rate of $2\frac{1}{2}$ per cent. That is a fee set by the individual company, although the Board sets a master fee.

Mr. Marcussen: That is what I thought. Respondent objects to the leading statement of standard fees, because it refers to the scope and language and not to the particular fee charge.

The Court: The objection is overruled. The Court understands the use of the expression in the question and considers that it doesn't involve a conclusion. [26]

Was there an answer to your question? I believe not. There was an objection.

Mr. Taylor: I have rather lost it. I will ask him the question again.

The Court: Read the question, please.

(Question read.)

The Court: Perhaps you should reframe your question then.

Mr. Taylor: Yes. All right.

Q. (By Mr. Taylor): Will you state what the fee charged by the San Francisco—authorized by

(Testimony of Richard E. Holl.)

the San Francisco Real Estate Board is, in the case of apartment houses and office buildings where the lessor furnishes janitorial services and utilities?

A. I don't quite understand your question.

(Question read by reporter.)

A. Meaning by that, that the building would be under lease to one tenant?

Q. (By Mr. Taylor): Well, yes.

A. That would make it vary. If it was not under lease to one tenant, the commission would run as high as 5 per cent. Where it is leased to one tenant, we have no property management problem, so the fee would be the minimum, 2 or 2½ per cent.

Q. In other words, in the case of stores and property such as you maintained for Count Lewenhaupt, I take it, the lessor did not furnish any utilities or janitorial services, is that correct?

A. That is correct.

Q. And you therefore charged him 2½ per cent of the gross rental?

A. That is correct.

Q. And that is your understanding of the standard fee? A. That is right.

Q. And how long has that standard fee been in effect in San Francisco?

A. Oh, I should say since 1940 on that particular basis. I mean they vary them every five or ten years, they may change, but that particular schedule was in effect since 1940.

Q. And is that in effect outside of San Francisco, in San Mateo and Modesto?

(Testimony of Richard E. Holl.)

A. That is right. They are all established by local boards covering those regulations. Real estate boards govern the different communities.

Q. But the fee is the same?

A. That is right.

Q. For the work prescribed, about 2½ per cent of the gross rental? [28]

A. That is right.

Q. Now, your \$30.00 monthly fee in 1946, or 1947 rather, was for managing these three parcels of property, the stores on San Jose Avenue, the stores and studios on Sutter Street, both in San Francisco, and 104 South El Camino Real, San Mateo.

A. That is correct.

Q. Now, in 1946, it has been stipulated that the Petitioner did not own the stores at El Camino Real in San Mateo.

Would you state how much your firm would have charged for the management of the Sutter Street property and the San Jose Avenue property in 1946?

Mr. Marcussen: I object. It has no materiality to the issues here as to what he would have charged for something he didn't do. I don't see what materiality that has. It seems to me it is going far beyond the limit that should be set.

Mr. Taylor: It has a direct bearing on the establishment of the fee.

The Court: Overruled. Will you read the question?

(Question read.)

(Testimony of Richard E. Holl.)

Mr Taylor: May I just say one thing? It has been stipulated that the total gross rentals were \$10,798.99.

The Court: The reporter can read the question, and you may keep in mind, Mr. Witness, that the gross rentals [29] were \$10,798.99.

Now, go back and read the question.

(Question re-read by reporter.)

The Witness: We would have charged 21½ per cent of the gross monthly receipts, or roughly I believe it comes to \$20.00 a month.

Mr. Taylor: Does the record show that \$10,798.99 figure?

Q. (By Mr. Taylor): Would that amount, in your opinion, have constituted a reasonable and adequate fee for the management of those two properties in 1946?

A. It would. We would have been very well satisfied.

Q. Now, it has been stipulated that until January 23, 1946, that is, for the first 23 days in 1946, the Petitioner also owned certain improved real property located in Modesto, California.

A copy of the lease which was in effect on this property when it was owned by the Petitioner is in evidence as Exhibit 4-D. I show you this lease, Exhibit 4-D, and ask you if you are familiar with its provisions?

A. It appears to be a net lease for fifty years from January 1, 1938.

Q. You have read this lease, have you not?

(Testimony of Richard E. Holl.)

A. I have seen a copy of it, yes, and read it. [30]

Q. And you are familiar with its provisions, are you?

A. Yes.

Q. Now, will you indicate the extent of the activities which an agent for the management of this property would have had to undertake?

A. Well, inasmuch as it is a net lease, there wouldn't be too much work involved, but only a matter of collecting the rentals in this particular building, as long as it is under lease to one tenant.

Q. When you say a net lease, will you indicate what you mean by that?

A. It is an absolute net lease. The lessor, under this lease, has to pay for maintenance, repairs and upkeep of the building, pay the taxes and insurance, and just pay the lessor a net rental of \$1,100 per month.

Q. So that there is nothing for the lessor or his agent to do, except to collect the rent, is that correct?

A. That is right.

Q. Now, what fee would your firm have charged for the management of the Modesto property during 1946?

A. Well, I think this would still be under the 2 per cent category, or \$22.00 a month, or \$20.00 a month, or whatever that rental is.

Q. So would that, in your opinion, constitute a fair fee for managing this property under the lease, a fair and adequate fee? [31]

A. It would. In fact, I would like to have a lot of them at \$20.00 a month.

(Testimony of Richard E. Holl.)

Q. You think Baldwin and Howell could do very well on that? A. I think we could.

Q. And you think other firms in San Francisco could do the same?

A. I believe they could.

Q. Will you state what, for the entire calendar year 1946, would have constituted a fair and adequate fee for managing Count Lewenhaupt's real estate, bearing in mind that the Modesto property was owned by him for less than one month.

A. That would be \$240.00 for the other two, plus—well, you would only have a fee for one month on the Modesto property, or \$20.00, making a total of \$260.00 for that year.

Q. Now, in addition to the \$30.00 a month that you charged, did you charge a further fee for reviewing leases? A. That is correct.

Q. And what did that fee consist of, or how was that fee determined?

A. That is also established by the different boards on a sliding scale, 5 per cent of the first year, 4 per cent of the second year, 3 per cent of the third year, and $1\frac{1}{2}$ per cent thereafter; on the basis of a new lease. On the basis of a renewal, the commission would be $\frac{1}{2}$ of those [32] amounts.

Q. Let me ask you: In the year 1947, there were no renewals on Count Lewenhaupt's properties, is that correct?

A. That I don't know, without looking at the record. You say it is stipulated. It must be.

Q. No, I didn't say that was stipulated.

(Testimony of Richard E. Holl.)

A. I misunderstood you.

Q. But you have your records there. Since the point has come up, would you check it?

A. No, there were no charges made during 1947.

Q. So that the entire amount charged the Count for managing his property was \$360.00?

A. That is correct.

Q. Now, it has been stipulated that in the year 1946 there were two renewals of leases; that there were no new leases with you, that there were two renewals of old leases. One of these is Exhibit 7-G in the exhibits attached to the stipulation of facts.

I show you Exhibit 7-G, and call your attention to the fact that it is a renewal of an appliance and repair and radio shop at 1788 San Jose Avenue, San Francisco, dated February 1, 1946, for a three-year term, for a total rental of \$2,340.00, consisting of \$60.00 a month for the first year, \$65.00 a month for the second year, and \$70.00 a month for the third year. [33]

The other renewal, it has been stipulated, was of a store at 1786 San Jose Avenue, and I would like to offer in evidence that lease, that renewal, preliminary to questioning the witness.

The Court: Is there any objection?

If there is no objection, the lease is received in evidence as Petitioner's exhibit next in order.

The Clerk: Exhibit 11.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 11.)

(Testimony of Richard E. Holl.)

Q. (By Mr. Taylor): I show the lease, Petitioner's Exhibit No. 11, and call to your attention the fact that it is dated January 31, 1946; a beauty shop at 1786 San Jose Avenue, for a three-year period for a total rental of \$2,340.00, payable \$60.00 a month the first year, \$65.00 a month the second year, and \$70.00 a month the third year.

Now, would you state what your commissions would have been for effecting those two renewals of leases for Count Lewenhaupt in 1946?

A. They would have been \$40.00; \$20.00 each, or \$40.00 for both of them.

Q. And that would have been a fair and adequate fee for that service? [34]

A. That is correct. [35]

* * * * *

Thereupon,

JAN CASIMIR ERIC EMIL LEWENHAUPT called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name and address, please?

The Witness: Jan Casimir Lewenhaupt, 114 West Poplar Avenue, San Mateo.

Direct Examination

* * * * * [42]

Q. (By Mr. Taylor): It has been stipulated that in December 1946, Count, on December 18, 1946,

(Testimony of Jan Casimir E. E. Lewenhaupt.)
you became the owner of a residence at 114 West Poplar Avenue, San Mateo, California.

Now, will you state how you happened to acquire that?

A. Well, I happened to be staying with Mr. Hastings, who was engaged in the real estate business. He is also a relation of mine, and well, we got to discussing real estate matters and he told me he had this property, and it seemed to me an excellent investment, particularly having view of the fact that he had a tenant who was all ready to move in at a very excellent rent.

In other words, I could rent it out immediately.

Q. You bought it as an investment, did you, because of the cheapness of the price, as pointed out to you by your cousin, Mr. Hastings?

A. That is right. I could see that by the returns.

Q. Who takes care of it for you now?

A. Davis and Clifton. [49]

Q. Who are they?

A. That was the firm where Mr. Hastings was working, the real estate firm.

Q. Did they charge you any fee for taking care of it for you?

A. They charged me no fee, in fact, they even offered to look after the El Camino property as well, without charge.

Q. You mean the stores at 100 to 104 El Camino Real?
A. Yes.

Q. Without any charge, they would collect the rent and manage it for you?
A. Yes.

(Testimony of Casimir Eric Emil Lewenhaupt.)

Q. And you were charged no fee by Davis and Clifton in 1946 or 1947?

A. No, none whatever, no.

* * * * * [50]

Q. Were you engaged in any business in the United States during the year 1946?

Mr. Marcussen: I object to that as calling for a conclusion.

The Court: The Court understands that that is the question at issue, and that this question is not binding upon the Court. It is a conclusion.

You may answer the question.

The Witness: No, I was not.

Q. (By Mr. Taylor): Did you have any branches in the United States during the year 1946?

A. No.

Q. Or at any other time? A. No.

Mr. Marcussen: Same objection to this line of questioning.

The Court: The record will show your objection. [52]

Q. (By Mr. Taylor): Were you engaged in any business in the United States at any other time prior to your coming here permanently in November, 1948? A. No.

Q. Did you have any mines in the United States during the year 1946 or at any other time?

A. No.

Q. Before or since 1948?

A. Neither before nor since.

Q. Is the same true of oil wells?

(Testimony of Casimir Eric Emil Lewenhaupt.)

A. That is correct.

Q. And of plantations?

A. None.

Q. And did you have any factories? Have you ever had any factories in the United States?

A. No.

Q. Have you ever had any workshops in the United States? A. No.

Q. Have you ever had any warehouses in the United States? A. No.

Q. Did you have any office in the United States in 1946, or at any time prior to your coming permanently in 1948? [53]

A. No.

Q. Did you ever have any agencies in the United States in 1946, or at any time prior to your coming here permanently in 1948?

A. No.

Q. Is the same true of installations?

A. That is correct.

Q. Did you ever have any fixed places of business in the United States in 1946, or at any time prior to coming here permanently in 1948?

A. No. * * * * * [54]

Thereupon,

RICHARD E. HOLL

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, was further examined and testified as follows: [107]

* * * * *

(Testimony of Richard E. Holl.)

Redirect Examination

Q. (By Mr. Taylor): In one of these exhibits, Exhibit K, it states that the charges for property management are 3 to 5 per cent of gross collections.

Did that minimum used to be $2\frac{1}{2}$ per cent in 1946?

A. Well, I don't remember what it was, whether it was or not. Now, there was a schedule previous to this one in effect, and it may have $2\frac{1}{2}$ per cent, but the Board couldn't find any of the old schedules when I went over there.

Q. It was either $2\frac{1}{2}$ or 3 per cent?

A. That is right.

Q. And did these schedules apply through Northern California, including Modesto and San Mateo?

A. They very generally apply, however, each local Board may have some further negotiations because they are very flexible. As you will note in there, it says, "depending on the type of property and the time and work involved." So that it is up to each individual from that to gauge his own charges.

Q. You would still charge at the rate of $2\frac{1}{2}$ per cent for your services in 1946, as you have testified? [109]

A. I would * * * * * [110]

E. C. LA MONTAGNE

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

(Testimony of E. C. La Montagne.)

Direct Examination

The Clerk: Please state your name and address.

The Witness: E. C. La Montagne, 320 Walsh Road, Atherton.

Q. (By Mr. Marcussen): Mr. La Montagne, I hand you Exhibit 2-B in this proceeding, and ask you whether you are the Clinton La Montagne referred to in that exhibit? A. I am.

Q. And I will ask you whether that exhibit correctly states the scope of your authority, as you understood it, during the years 1941 to 1946?

Mr. Taylor: Did you say 2-B?

Mr. Marcussen: 2-B, the power of attorney.

The Witness: Naturally. [193]

* * * * *

Q. (By Mr. Marcussen): Now, my question was, Mr. La Montagne, referring to the single structure containing two stores, referring to the Burlingame property, will you identify what those two stores were and who the tenants were in those two stores, during the [205] years 1941 to 1944?

Mr. Taylor: May it be understood that the same objection applies to this entire line of testimony?

The Court: It is so understood.

Mr. Taylor: In a year, other than 1946.

The Court: It is so understood, but the ruling is that the Court will hear that testimony, and the entire problem will be given the weight to be given the testimony relating to transactions in previous years, as the record will show.

(Testimony of E. C. La Montagne.)

Will you read the question to the witness.

(Question read by Reporter.)

The Witness: The only one I can identify—one was a barbershop, and the other was a part-time automotive parts store. It was vacant for quite a bit of time, and I believe over one month, during the Christmas season, was rented out to a man for the sale of Christmas trees.

Q. Now, referring to the barbershop, was it the same barber? A. The same barber.

Q. For all those years?

A. All the time the property——

Q. Was he delinquent in his rent from time to time?

A. From time to time, he was, but generally always made it up. [206]

Q. Did you find it necessary to go there and collect the rent?

A. Sometimes, I would stop on my way, as I lived in Atherton, I drove to the City, and I would stop by on my way home.

Q. And do you recall whether or not these transactions regarding the other part of that property occurred from July 1943 to March 1944?

A. I couldn't tell you the dates now.

Mr. Marcussen: Counsel, will you stipulate to that effect? It is shown by the books I have examined—I have examined the books, and they sustain that statement. Would you like to stipulate to that, that they were vacant during that period, ex-

(Testimony of E. C. La Montagne.)

cept for December, 1943, when it was leased for the purpose of selling Christmas trees?

I would like to request that you stipulate, if you can, subject to checking it, so you may proceed.

Mr. Taylor: Please, just a minute. Well, I am in this position, Mr. Marcussen, if you say that is what the books show, I would be very happy to accept your word. I have never looked at this before, because, to me, it has had and has no significance.

Just so long as my stipulation in no way affects my right to object to the complete immateriality of this evidence, it will save time and a rather long, drawn-out [207] trial, and I will stipulate what the books show so that you don't have to continue.

The Court: Well, this stipulation is being made by you, Mr. Taylor, simply to obviate the necessity of having the books introduced in evidence?

Mr. Taylor: Yes, your Honor.

The Court: You are simply waiving the necessity of having the books put in evidence?

Mr. Taylor: I consider it completely immaterial.

Mr. Marcussen: And subject to your further qualification that it is subject to check for any inaccuracies?

The Court: I think that would be agreeable, of course.

Q. (By Mr. Marcussen): Now, what efforts were made by you to lease that property, which was vacant?

A. Well, we actually put it in the hands of a

(Testimony of E. C. La Montagne.)

local real estate firm—firms in San Mateo and Burlingame.

Q. Did you put a sign in the window?

A. Put a sign in the window to try and obtain a tenant.

Q. Now, referring to what is called the Modesto property, which was sold in 1946, did you go to Modesto to inspect that property from time to time during the years 1941 to 1946?

A. Yes, I went to visit. I never made any special [208] trip. My daughter and her husband were stationed at Leemore and at Bakersfield, and we went down to visit them quite frequently and, occasionally, we would swing around to Modesto on our way, so I could see that the property was being taken care of in the manner called for under the lease.

Q. Did you renew the mortgage on that property in 1944? A. I did.

Q. Now, it is stipulated that in 1941—in stipulation 2, Paragraphs 30(a), (b), and (c)—that the Petitioner was the owner of property characterized as the Hyde Street property, other property referred to as Hyde-and-Pacific property, and another property referred to as Locust-and-Sacramento property.

Could you briefly describe what those properties were?

A. They were all apartments or flats.

Q. Now, approximately how many apartments

(Testimony of E. C. La Montagne.)

were there in the Hyde Street property and the Hyde-and-Pacific property.

A. I vaguely remember probably six in each.

Q. And how many in the Locust-and-Sacramento property?

A. I think there were about eight.

Q. Now, during the year 1941, did you, from time to time, find it necessary to collect the rents there that were in arrears?

A. Occasionally, yes.

Q. What do you mean by occasionally? Didn't you go [209] there every month?

A. Well, I say occasionally I would have to go and collect the rents that were in arrears. I went and collected the rent during that time that I was collecting the rents of the Hastings Estate properties, and I just went around at the same time I was collecting those rents and collected the rent at these locations. Most of them, however, were mailed in to the office.

Q. Only the arrears that you collected?

A. No, some paid by cash when I came by.

Q. Were there a number of delinquencies from time to time in the rent payments?

A. Generally, someone might be a half a month delinquent or something of that kind.

Q. Now, in Paragraph 34 of Stipulation 2, it is stipulated that certain janitorial services and utilities were furnished by the Petitioner as shown on Schedule D attached to that stipulation.

Mr. Taylor: That is for the year 1941?

(Testimony of E. C. La Montagne.)

Mr. Marcussen: Yes.

Mr. Taylor: Because it is stipulated for subsequent years, no such services were furnished.

Q. (By Mr. Marcussen): And I think the total amount shown in Schedule D is \$123.40. Can you state what those services—what services [210] were covered by those items to that apartment?

A. The Hastings Estate and William A Lange employed a Japanese janitor who serviced all the properties that required janitorial service, and he was employed by the Lewenhaupt properties to serve their properties.

I do not believe that the Sacramento-and-Locust Street property required any of his services except maybe plumbing or something out of order. He was sent out there specifically to do that. I think most of his services went to 2027 Hyde Street.

The Court: Who was William A. Lange?

The Witness: William A. Lange was a real estate broker and insurance man and former trustee of the Hastings Estate, and had quite a bit of property management in his office.

The Court: And, in that aspect, was he acting as a trustee, or was he performing managerial services?

The Witness: Performing managerial service with his own properties that he owned.

Q. (By Mr. Marcussen): The reference there, as I understand it, was that the employee, the man you employed to do that work, was also employed by the Hastings properties?

(Testimony of E. C. La Montagne.)

A. Yes, we all paid part.

Q. Now, was there certain other janitorial work and [211] superintending performed, with respect to those properties in the year 1941?

A. If there were, it was done by tenants in the building who received a slight reduction in their rent, in order to compensate them for that service.

Q. Did any of them receive their entire rent free for that service?

A. No, I don't believe so.

Q. Now, it is stipulated in this case that certain repairs were made from time to time to all of the properties owned by Petitioner.

Now, with respect to the year 1941, who was in charge of those repairs?

A. I was, naturally.

Q. And, on whose recommendation were they made? A. Mine.

Q. How did you get your information?

A. Well, the tenants in the building would tell me there was something wrong, and I would have to see that it was repaired.

Q. You made inspections of the properties in 1941? A. I did.

Q. Did the Japanese employee who did janitor service also do some of that work?

A. If anything happened while he was there in the [212] building, or, if one of the tenants told him something was wrong, he would relay it to me.

Q. He was not there after 1941?

A. No, he was taken away.

(Testimony of E. C. La Montagne.)

Q. Thereafter, were the repairs made from information received from tenants and from your own personal inspection? A. Yes.

Q. Now, with respect to all of the real properties owned by the Petitioner, during the years 1941 to 1946, did you pay taxes and insurance on all of them, except the Modesto property?

A. Yes.

Q. Now, there is some property referred to in the stipulation as the San Jose Avenue property in San Francisco.

In 1945, did you have some difficulty with respect to occupation of those premises by an unauthorized person? A. I did.

Q. Will you describe those very briefly?

A. A party called me up and said, "I understand you have a vacant store with living quarters in the rear for rent." And I talked the matter over with him on the telephone, and he wanted to look at the property. I told him that one of the tenants had the key, which he did, as it was a long way out there, and we would leave the key with another tenant. [213]

He obtained the key and went to look at the store, and I had made arrangements to meet him the following morning at 10:00 o'clock.

Q. Excuse me. It is a little too much detail, as far as I am concerned.

A. Anyway, when I got out there, he had moved in with his family and was locked in, and I couldn't get him out. The police couldn't, the Health

(Testimony of E. C. La Montagne.)

Department couldn't get him out, and the Water Company shut off the water and gas and everything.

Q. How did you finally get him out?

A. I discovered he had a stolen car in his possession, and the finance company—I reported to the finance company and they got him out.

Q. Did you take any legal action?

A. I had legal action taken, a subpoena issued for his arrest, or to get out, I have forgotten which it was, but anyway I couldn't serve it.

Q. Did you get a judgment eventually?

A. But we couldn't serve it on him.

Q. The sheriff wouldn't go in?

A. No.

Q. Now, will you state as clearly as you can recollect it what arrangements you had with Count Jan for your compensation, pertaining to your services, under this power of attorney? [214]

A. I was——

The Court: I beg your pardon. You said, "your services under the power of attorney"?

Mr. Marcussen: Performed under the power of attorney.

The Court: Does that question involve a conclusion? Why wouldn't the question be, "for your services, period."

Mr. Taylor: I object to the question.

The Court: Well, it is just a detail. You may answer the question.

The Witness: Well, the compensation was set by Count Eric at the time that the power of at-

(Testimony of E. C. La Montagne.)

torney was issued and was increased from time to time.

Allowance was made for clerical services, for rent and, at a later date, I believe possibly in the last year of our operations, my compensation was fixed on a lump basis wherein a lump sum was paid to me and, from that, I paid all clerical fees and services—I mean, rent and telephone and so forth.

Q. (By Mr. Marcussen): And, approximately when, prior to 1945, was it that you had the arrangement whereby you received a fee for your services and were also reimbursed for your expenses, office expenses in general, including rent and clerical? [215]

A. Up to—I believe, I don't remember whether it was the first part of 1946 or the exact date, when this lump sum went into effect, but, prior to that time, I was paid a certain fee, and then it was carried in the books, as my fee, and the rent was separate, and the clerical help was separate, and telephone was separate—my share of the telephone was all separate.

Q. Thereafter, you received an increased fee, and expenses, the office expenses, so to speak, were on you?

A. That was done to simplify the bookkeeping.

Q. Now, do you recall in 1946 what your monthly compensation was?

A. In 1946, the total compensation was \$6,000 a year.

(Testimony of E. C. La Montagne.)

Q. Now, did you receive anything additional, upon the termination of your power of attorney?

A. Upon the termination of the power of attorney, I was given a check for \$1,500.

Q. And what was that for?

A. That was what you might call severance pay.

Q. And did you continue for a period of approximately two or three months to wind up?

A. I continued because of the necessity of cancelling governmental licenses in my name. Everything at that time had to be done by Treasury Department License and certificates from the Swedish Embassy in New York, for the [216] transmission of funds to Europe and to Sweden.

Q. In other words, for winding up unfinished business under the power of attorney?

A. You see, even at that time, Swedish funds were blocked, and the safe deposit box was locked.

The account in the American Trust Company was blocked. It had to stand in my name, and those things all had to be released to the different parties and the different persons handling the properties.

There were licenses that had to be issued by the Treasury Department for the purchase and sale of stocks. There had to be licenses issued for the purchase and sale of real estate and further withdrawal of any of those securities from the safe deposit box, and it necessitated my winding all those things up, and having them transferred in the name of the people succeeding me.

(Testimony of E. C. La Montagne.)

The Court: Do you mean to say licenses were issued to you in your name?

The Witness: They had to be.

Q. (By the Court): And when the power of attorney was terminated, those licenses had to be terminated also, is that right, or transferred?

A. They didn't have to be terminated, but they should have been, because I no longer had the authority to act. [217]

Q. Well, the license would have become inoperative?

A. Inoperative.

Q. At least, you should notify the authorities that issued the licenses that they were going to be inoperative?

A. Yes, and asked them to transfer them into the name of the people that were going to operate them.

Q. And they were transferred into the name of others?

A. Yes.

Q. (By Mr. Marcussen): Now, then, out of the \$6,000 that was paid to you in 1946, pertaining to services, regular services, performed during that year, can you state what the allocation was as between your personal compensation, and what the allowance was for expenses?

A. My personal compensation was \$350 a month.

Q. And the balance of \$150—

A. Was to cover the office expenses.

* * * * * [218]

E. C. LA MONTAGNE

having been previously duly sworn, was further examined and testified as follows:

* * * * * [225]

The Court: It has been the Court's concern that the Respondent might contend that the Petitioner was engaged in trade or business for purposes of Section 211 (b) because of activities, in addition to the real estate transactions, and, if the Respondent is going to contend that other activities, namely, the purchase and sale of securities, in addition to the purchase and sale of real estate, constitutes doing trade or business in the United States, then that must be made clear; but, because of the Neubaur case particularly and the issue involving the precedent of whether the Petitioner was engaged in a trade or business, which was based upon the contention that the transaction in securities constituted being engaged in trade or business—if the issue is that broad, then the whole matter of proof is correspondingly widened.

It is my view that we cannot, under the pleadings as they are presented now, try an issue which involves the question of whether the purchase and sale of securities constituted doing a trader business.

The Neubaur case was a very difficult case. The position of this Court is perfectly clear in the opinion in that case. I don't know whether the Petitioner had yet applied for certiorari in that case. As far as I know, no certiorari has been granted.

The question there was simply the scope of the

(Testimony of E. C. La Montagne.)

statutory provisions and whether Congress has intended certain [287] things in the statute as it was enacted.

Now, I think, Mr. Marcussen, that if you are going to argue that Petitioner was engaged in trade or business because of securities transactions that that will have to be an affirmative allegation made at the trial, and that you will then have the burden of introducing evidence on that issue.

I don't think that you can contend that proof of whether the real estate transactions constituted a trade or business requires evidence with respect to other transactions. In fact, that is a ruling which I now make, during the trial of the case.

Mr. Marcussen: I am quite in agreement with your Honor. I haven't had the benefit of reading the Neubaur case, but I know, by the specific terms of Section 211 (b) of the Statutes, that a taxpayer is not to be regarded as being engaged in a trade or business, merely by virtue of effecting, through a resident broker, transactions in the United States, of commodities or stocks or securities.

Now, my only point about it is this: That the full extent of Petitioner's activities in the United States may be otherwise material, with respect to the question bearing on his real estate activities, and I wish to make that clear and, if, on the state of the pleadings or on the state of this record, when it is finished, if Respondent is precluded, we will have to suffer that preclusion, because that [288] is our position here now.

But, we do not intend to make the argument

(Testimony of E. C. La Montagne.)

that activities in securities constitute the doing of a trade or business. * * * * * [289]

Cross Examination

Q. (By Mr. Taylor): Now, it has been stipulated that the cost of this property was \$67,500. Now, did you receive a commission on [317] that sale, Mr. La Montagne? A. I did.

Mr. Taylor: I ask that this be marked for identification.

The Court: Exhibit 16 for identification.

(Thereupon, the document above referred to was marked for identification Petitioner's Exhibit No. 16.)

Q. (By Mr. Taylor): I show you a check marked Petitioner's Exhibit for identification 16, designated "E. C. La Montagne, Special. San Francisco, California, June 12, 1946; Pay to the Order of E. C. La Montagne, \$3,375."

That is drawn on the American Trust Company, Head Office, 464 California Street, San Francisco, No. 724, and signed by E. C. La Montagne and endorsed E. C. La Montagne. A. Correct.

Q. Is that the check by which you received the commission? A. It is. * * * * * [318]

Thereupon,

JEROME C. DRAPER

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows: [324]

(Testimony of Jerome C. Draper.)

Direct Examination

The Clerk: Please state your name and address.

The Witness: Jerome C. Draper. My office address is 257 Primrose Road, Burlingame; my residence address is 320 Hillsborough Boulevard, San Mateo Post Office.

Q. (By Mr. Taylor): You came here pursuant to a subpoena which Petitioner served upon you?

A. Yes.

Q. So you are testifying pursuant to subpoena?

A. Yes.

Q. Mr. Draper, you are a member of the real estate firm of McDonald, Wilson & Draper, 257 Primrose Road, Burlingame?

A. One of the three partners. It is not a real estate firm. It is a co-partnership for the purpose of investing in real estate. I am the manager.

Q. And you have been one of those partners since prior to 1946? A. Yes.

Q. Do you know Mr. E. C. La Montagne, who was present in this courtroom and who is present at the moment? A. Yes, I do.

Q. And whom you heard testify?

A. Yes, I do. [325]

Q. While you were in the courtroom?

A. Yes.

Q. Did you sell to him, or did you grant him an option on or about June 7, 1946, in favor of Jan C. Lewenhaupt, who is also present in this courtroom, is he not? A. Yes.

Q. And whom you have met?

(Testimony of Jerome C. Draper.)

A. That is correct.

Mr. Marcussen: Is your answer to the entire question that you did grant that option?

The Witness: Yes.

Mr. Taylor: I am in the middle of my question.

Q. You have met Jan C. Lewenhaupt?

A. I met him, yes.

Q. Did you grant an option to Jan C. Lewenhaupt through Mr. E. C. La Montagne, on or about June 7, 1946, to certain property at 100 to 104 South El Camino Real, San Mateo?

A. I did.

Q. Now, state, if you know, how much you received from Mr. La Montagne at that time?

A. At that time I received \$10,000, or we received \$10,000.

Q. I show you a photostat of a check, Petitioner's Exhibit 15, dated June 12, 1946, E. C. La Montagne, Special Account, 722, in the American Trust Company, 464 California [326] Street, Head Office, payable to McDonald, Wilson & Draper in the amount of \$10,000, signed E. C. La Montagne, and endorsed "Pay to the Order of Bank of America, McDonald, Wilson & Draper."

Is that the check that you received?

A. I recognize our endorsement on the rear. It coincides—on the reverse side, it coincides with the dates our books show that we received \$10,000, and I recognize his signature.

Q. Did you receive any other money from Mr. La Montagne in 1946 on account of the sale of

(Testimony of Jerome C. Draper.)

this property? A. No.

Q. Did you receive any payment on account of the sale of this property in 1947? A. Yes.

Q. Will you state how much?

A. I will have to refer to my file. It was approximately \$53,000 and something.

Mr. Taylor: I ask that this check No. 756 be marked Petitioner's next exhibit for identification.

The Clerk: Exhibit 17 for identification.

(Thereupon, the document above referred to was marked for identification Petitioner's Exhibit 17.)

By Mr. Taylor: I show you Petitioner's Exhibit 17 [327] for identification, Check No. 756, dated December 16, 1946, designated E. C. La Montagne, Special, San Francisco, California, drawn on the Head Office of the American Trust Office, 464 California Street, and it says, "Pay to the Order of San Mateo County Title Company," in the amount of \$52,861, and it is signed E. C. La Montagne.

Does that check represent the balance which you received, or which McDonald, Wilson & Draper received, on account of the sale of the 100 to 104 El Camino Real property?

A. It is approximately the same amount which we received from the title company.

Q. Your books would show it?

A. The exact amount.

Q. Do you have your books here?

A. I have. They are over there.

(Testimony of Jerome C. Draper.)

Q. You have examined your books on this matter before you entered the courtroom?

A. Yes.

Mr. Marcussen: I want to interpose an objection to this entire line of questioning.

Are you attempting to impeach the stipulation? We have stipulated what the purchase price of this property was, and I don't see the materiality of any of this evidence. If the purpose is to lay a foundation for some possible claim [328] that Petitioner may have against Mr. La Montagne, it is wholly immaterial to this proceeding, and has no relevance, and I think is something that should not be gone into.

The Court: The objection is overruled for the present.

Mr. Marcussen: May we have a statement of what the purpose is?

The Court: You may move to strike afterwards. It simply delays our proceeding if we have so much colloquy.

Mr. Taylor: I think the purpose is obvious.

The Witness: This was \$10,000 received on June 27.

By Mr. Taylor: 1946? June 1946? And that was the \$10,000 deposit?

Mr. Marcussen: What was the date again?

The Witness: Our books recorded it June 27, 1946.

Mr. Marcussen: Is that necessarily the day on which it was received?

(Testimony of Jerome C. Draper.)

The Witness: No, this could have been, I assume, within a few days thereafter. When was the check dated?

Mr. Taylor: The check, Petitioner's Exhibit 17, the check for \$10,000 to McDonald, Wilson & Draper, is dated June 12, 1946, is it not?

The Witness: Yes. When did we deposit the check? [329]

Q. (By Mr. Taylor): And it shows that it was deposited—at least there is a bank endorsement on it, June 29, 1946.

Mr. Marcussen: Just a moment. I think that the day that it is paid would be the perforation and that is June 29, 1947.

Mr. Taylor: 1946.

Mr. Marcussen: It says '47 in the perforation. 6/29/47.

The Court: May I see it, please?

Mr. Taylor: The perforation does seem to say 1947.

The Witness: I can assure you it was '46.

Mr. Marcussen: That is apparently an error then.

The Court: Well, ordinarily, these marks by banks are not errors. The check, Exhibit 16 for identification, to Mr. La Montagne, for \$3,375, shows that it was paid 6/27/46. The other is '47.

Mr. Taylor: We are referring to the \$10,000 check.

The Court: Well, I know, but the two checks bear the same date. They were made out on the

(Testimony of Jerome C. Draper.)

same date. Well, I don't know whether it is an error.

Mr. Marcussen: I will stipulate that must have been 1946.

Mr. Taylor: In view of counsel's stipulation that [330] check cleared June 29, 1946, I will accept the stipulation, the statement of Mr. La Montagne shows that as a fact.

Mr. Marcussen: I have seen that, too.

Q. (By Mr. Taylor): Then your books show that McDonald, Wilson & Draper received \$10,000 on or about June 27, 1946? A. Yes.

Q. Now, when did McDonald, Wilson & Draper—when do your books show that McDonald, Wilson & Draper received the balance of the amount on the sale of the 100 to 104 El Camino property?

A. On June 7, our books show we received \$52,855.50, on June 7, 1947.

Q. So you received \$10,000, plus \$52,855.50?

A. If you would like to know how the total was arrived at—

The Court: I don't think it is material. The closing is made by the title company, and they have to take out expenses, or accruals or something or other.

Q. (By Mr. Taylor): Did you receive in full payment for the sale of that property the sum of \$62,855.50?

A. That was plus and minus proration. If you will let me refer to the escrow, I will tell you the exact amount of the purchase price. \$63,378 was the

(Testimony of Jerome C. Draper.)

full amount of the [331] purchase price which we called for.

Q. And that is all you received?

A. \$63,378.

The Court: Then you had better explain what the other charges were in the closing, so that we won't be in doubt about it.

The Witness: We were given a credit, in addition to the full purchase price, of \$305.20 for pro-rata of fire insurance which was assumed by the purchaser.

The Court: That is prepaid fire insurance?

The Witness: Yes, and we were given further credit of \$25.15 for pro rata of rentals for the month of June, 1947. We gave the purchaser credit for \$10,000 deposit already paid, and credit for \$780, which represented the security on the leases.

We also paid \$69.85 revenue stamps and \$3.00 for notary fee, which left us a net balance of \$52,855.50.

Q. (By Mr. Taylor): Plus the \$10,000 theretofore received on the option?

A. I mentioned that had already been given as a credit.

Q. So the entire payment you received was \$63,378?

A. As far as the purchase price was concerned, yes.

Q. Now, you never received any of this amount of [332] \$3,375 indicated in the check dated June 12, 1946 from Mr. La Montagne to Mr. La Mon-

(Testimony of Jerome C. Draper.)

tagne, Petitioner's Exhibit 16? A. No.

Q. Did Mr. La Montagne tell you that he was keeping any commission for himself?

Mr. Marcussen: I object to that as wholly immaterial. It has nothing to do with the issues in this case. The purpose is merely to lay a foundation for some possible claim which the Petitioner has against Mr. La Montagne and the Tax Court is not a place for such discussions.

The Court: Objection overruled.

The Witness: We were asking, as I recall, or we set a price of \$66,500, and Mr. La Montagne wanted to purchase on a net basis.

The price which we had established would have included a five percent commission, but we paid no commission. We sold for the amount which I mentioned.

I can't recall—I can't recall any discussion. It was none of my business. It didn't interest me in the slightest. The only thing I was interested in was the fact that we received what normally would have been a fullselling price, less a normal commission.

It is the practice of our partnership always to pay full commissions, if a broker sells. We incidentally do very little such business, and, in my agreement with my [333] partners we never participate in a commission.

Q. You reduced your price by the amount of the commission which you would otherwise have

(Testimony of Jerome C. Draper.)

paid, because Mr. La Montagne waived the commission?

Mr. Marcussen: Objection.

The Court: The answer seems to be an explanation, rather than direct answer.

Will you read the question?

(Question read by Reporter.)

The Witness: Yes, to the best of my recollection, he told me that he had an arrangement whereby he was paid a commission from his client. I had no reason for knowing whether it had been paid or what the arrangement was, but he wanted a net price from us.

Q. (By Mr. Taylor): In other words, he wanted a price whereby you eliminated the commission which you would ordinarily pay for the sale of your property? A. That is correct.

The Court: It is as broad as it is long. If you had gotten \$66,500, you would have turned around and given Mr. La Montagne around \$3,375?

The Witness: That is true. I was perfectly willing to pay a commission. He had a broker's license, but he preferred it the other way. * * * * * [334]

Thereupon,

E. C. LA MONTAGNE

recalled as a witness for and on behalf of the Respondent, having been previously duly sworn, was further examined and testified as follows:

(Testimony of E. C. La Montagne.)

Further Cross Examination

Mr. Taylor: Could you go back and determine the last question I asked Mr. La Montagne?

(Question read by Reporter.)

Q. (By Mr. Taylor): Now, Mr. La Montagne, you stated that you advised Count Jan Lewenhaupt, or Count Eric Lewenhaupt, either or both, of the fact that you received \$3,375 commission on the purchase by you for Jan Lewenhaupt of the 100 to 104 El Camino property in San Mateo.

A. I did not say that I advised them of the fact that [339] I had received it. I said that, in the letter, there was something—I don't remember the exact details of it—concerning the amount paid out at the time of the option, approximately \$13,000, of which \$10,000 was for the option and approximately \$3,000 was for the commission.

Q. Did you advise either Count Jan or Count Eric, at the time you drew the check for \$10,000 to McDonald, Wilson & Draper, Petitioner's Exhibit 15, and for \$3,375 to yourself, Petitioner's Exhibit 16, that you were receiving a commission of \$3,375 upon the execution of the option?

A. No, I did not. I didn't think it was necessary. * * * * * [340]

Q. Now, Mr. La Montagne, I show you Exhibit 5-E, which is an exhibit attached to the Stipulation of Fact in this case and is in evidence as such, and call to your attention that is a uniform agreement of sale, with regard to the Modesto property, dated December 20, 1945, signed by Martin Stelling, Jr.,

(Testimony of E. C. La Montagne.)

as buyer, and also signed Jan C. Lewenhaupt, Clinton La Montagne, attorney in fact. Is that correct?

A. That is correct.

Q. Do you know a man by the name of Mervyn O'Neil? A. Very well.

Q. Is he a good friend of yours?

A. Very good.

Q. And is he a partner, or does he work for or as a partner of B. P. Oliver & Co.?

A. B. P. Oliver & Co. were the agents for the seller, under the uniform agreement of sale, yes.

Q. And Mr. Jan La Montagne of course was the seller?

Mr. Marcussen: Just a moment.

Q. (By Mr. Taylor): I beg your pardon, Jan Lewenhaupt. Now, this uniform agreement of sale, Exhibit 5-E, states, does it not, "I hereby approve the sale of said property above described upon the terms and conditions hereinbefore [352] set forth and pay upon demand of the B. P. Oliver Co. the sum of \$12,000 for services rendered. Jan C. Lewenhaupt, Clinton La Montagne, his attorney in fact." A. That is correct.

Q. That \$12,000 was a commission?

A. Commission, yes.

Q. Was that paid to B. P. Oliver & Co.?

A. Paid directly from the title company.

Q. Did they receive the entire amount?

A. They received the full \$12,000.

Q. Did you receive any of it?

A. I don't remember whether I did or not, Mr.

(Testimony of E. C. La Montagne.)

Taylor. If I did, it was a gift from B. P. Oliver & Co. to me. * * * * * [353]

Q. (By Mr. Taylor): Mr. La Montagne, I show you Petitioner's Exhibit 21 for identification. I will read what it says, and if I am in error, correct me.

It is on a billhead of Title Insurance and Guaranty Company, a Trust Company, 130 Montgomery Street, San Francisco, California. February 1, 1946. It is Application No. 421536, Trosach is the man's name. A. Woman's name.

Q. It is addressed to E. C. La Montagne, 369 Pine Street, San Francisco, California. It says, "In re: Jan [354] Casimir Lewenhaupt, Tenth and J Streets, Modesto."

Then it shows a credit of \$252,000, showing the amount received, apparently received, and then it shows on the other side how that \$252,000 was disposed of.

Now, I will skip some of the dispositions that don't make any difference here. Does it say:

"B. P. Oliver Co., \$6,750?"

A. It does.

Q. Does it say: "E. C. La Montagne, \$5,250"?

A. It does, but I don't remember it.

Q. Now, is the sum of those two \$12,000?

A. It is.

Q. Then, it shows, check inclosed, \$214,144 and 21 cents. A. It does.

Q. That \$214,000 is the balance of the \$252,000 after subtracting the \$12,000 commission and other

(Testimony of E. C. La Montagne.)

charges itemized on Petitioner's Exhibit 21 for identification? A. Yes.

* * * * * [355]

Q. (By Mr. Taylor): Mr. La Montagne, I show you Petitioner's Exhibit 21 in evidence, a statement from the Title Insurance and Guaranty Company, dated February 21, 1946, and ask you whether you received the commission of \$12,000 on the sale of the Modesto property—whether you received the sum of \$5,250?

A. If it says so in the statement, it must be true, because they don't tell lies. I don't remember receiving it. I don't remember any of the details about it. [356]

Q. Now, Mr. La Montagne, did you advise Count Eric Lewenhaupt prior thereto or after the sale—at the time of the sale, prior thereto, or after the sale—that you were receiving a commission on the sale of the Modesto property?

A. No, I did not.

Q. Neither prior thereto nor after?

A. At no time.

Q. Or at any time?

A. I am quite sure I didn't.

Q. Did you advise either Count?

A. I said I am quite sure I didn't.

Q. I am sorry I repeated the question, because I wasn't sure just how I could phrase it, and I wanted to cover it. Did you turn over to either Count any part of the commission you received on the sale of the Modesto property?

(Testimony of E. C. La Montagne.)

Mr. Marcussen: Same objection to the entire line of questioning; what he did with it is immaterial.

The Court: Objection overruled.

The Witness: I couldn't answer that question, because, as I say, I don't remember receiving it.

Q. (By Mr. Taylor): Did you turn over to either Count any part of the commission of \$3,375 you received on the purchase of 100 or 104 El Camino Real? A. No, I did not. [357]

Q. You kept it? A. Yes.

Q. Now, did you keep the commission shown on Petitioner's Exhibit 21, which you received upon the sale of the Modesto property, because you considered yourself a broker and entitled thereto as brokerage?

Mr. Marcussen: Same objection.

The Court: Objection overruled.

The Witness: If I did, it was for that reason.

Q. (By Mr. Taylor): In other words, you had a brokerage business at 369 Pine Street, and had many transactions there, and you considered the sale of the Modesto property as just one of your transactions, so that you were entitled to some sort of a commission?

A. Yes, if I did, I know the deal was instigated by B. P. Oliver and Company, and made by them. I had nothing to do with the making of the sale of the Modesto property, I mean in the sense that Martin Stelling's end of it.

* * * * * [358]

(Testimony of E. C. La Montagne.)

Redirect Examination

Q. (By Mr. Marcussen): Mr. La Montagne, did you have a conversation with [371] Mr. Taylor shortly before the trial of this action began, in which you had any discussion with respect to what you would or would not say at this hearing?

Mr. Taylor: I object to the question as another attempt to try Petitioner's counsel. I thought we had disposed of that last week.

I might say, since the question has been raised, that between last week's hearing and this week's hearing, I thought I had both Mr. Neblett and Mr. Marcussen agree that it was perfectly proper for me to speak to Mr. La Montagne.

Mr. Marcussen: There is no question about that. The witness has been subject to attack, his credibility has been impugned, and any statement that he made to counsel for Petitioner with respect to his testimony, what he would testify in this Court, would be to establish the credibility of the witness. His credibility has been attacked.

The Court: I don't see any objection to the witness answering the question. Go ahead and answer the question. I think the reason for the question is something that there may be difference of opinion about. Mr. Marcussen has given his reason for the question.

Read the question.

(Question read by Reporter.)

Mr. Marcussen: Yes or no, if you please.

The Court: No, the witness may answer the

(Testimony of E. C. La Montagne.)

question [372] in any way that is suitable to answer the question.

Mr. Marcussen: What did you say?

The Court: The question has been read.

The Witness: I will answer yes. I had a discussion with Mr. Taylor.

Q. (By Mr. Marcussen): What did he say and what did you say?

A. At the time Mr. Taylor asked me to answer the questions that were submitted to me on the witness stand briefly and not to offer any explanations thereof.

Q. And what did you say?

A. I said I would tell the truth in answer to your questions or to Mr. Taylor's questions.

Q. Did he tell you he proposed to call you as a witness?

A. He didn't mention the matter whether he would call me or who would call me as a witness.

Q. What did Mr. Taylor say?

A. I say he did not.

Q. I say, after you told Mr. Taylor what you had said, what else did Mr. Taylor tell you?

A. He said he wouldn't consider for a minute asking me to do anything but tell the truth.

Mr. Taylor: Thank you, Mr. La Montagne. I appreciate that. [373]

Q. (By Mr. Marcussen): What else did he tell you?

A. Just that, if—I can't remember the exact words, but words to the effect that, if I went into

(Testimony of E. C. La Montagne.)

details, that you would drag the case out over a long period of time.

Q. You are referring to Marcussen?

A. Marcussen.

Q. And what else did he say?

Mr. Taylor: That sounds prophetic.

Mr. Marcussen: Pathetic?

Mr. Taylor: Prophetic.

Q. (By Mr. Marcussen): Tell us what else he said. Tell the Court.

A. To tell you frankly, I am in a frame of mind right now where I can hardly remember my own name.

Q. Did he say, if you did go on and answer the questions and volunteer any information, he might have to get tough with you?

A. I believe he did say something to that. He said, he might have to get a little rough.

Mr. Taylor: If the Court please, I object to this line of questioning.

Mr. Marcussen: I should think you would.

Mr. Taylor: And move to have it stricken. It is highly improper. It is almost ridiculous. [374]

The Court: Well, we will let it stand. Now, go on with the rest of your redirect examination.

The Court does not agree with Mr. Marcussen's view about the reasons for the questions that were asked on cross examination, and therefore the Court does not believe that this first question on redirect was necessary, but I thought it was necessary to have all doubts removed.

(Testimony of E. C. La Montagne.)

Thank you for answering the question, Mr. La Montagne.

Now, shall we go on to other matters, the merits of the questions.

Mr. Marcussen: May I have Exhibits 14, 15, and 16, please?

Q. Now, I hand you a rather substantial bound book, and ask you if you can identify that.

A. It was a book with the records of disbursements and receipts of the properties of Jan C. Lewenhaupt.

Q. And I call your attention to the disbursement side of Page 52 and specifically to the item \$3,375, and ask you to read into the record what it says under that item.

A. It says, "Check 724," apparently the date was the 12th, "E. C. La Montagne, to pay commission on purchase of San Mateo property."

The Court: What is the amount, please?

The Witness: \$3,375. [375]

Q. (By Mr. Marcussen): And that check is Petitioner's Exhibit 16 in evidence, is it?

A. Yes.

Q. Was this black book turned over by you to Petitioner in this case in 1946? A. It was.

Q. Now, was the check representing that commission of \$3,375 among the checks, so far as you recall, which you turned over to Petitioner in 1946? A. It certainly must have been.

Q. And how about Petitioner's Exhibit 14. I beg your pardon. Strike that.

(Testimony of E. C. La Montagne.)

How about Petitioner's Exhibit 21, which is the statement showing the items in—itemization of the purchase price, or rather, the selling price of the Modesto property, and it shows the amount of commission, B. P. Oliver to E. C. La Montagne.

A. That must have been in the files, too.

Q. Do you recall receiving that?

A. I don't remember, Mr. Marcussen. I don't remember that, but the papers of all those transactions were kept together, and it should have been in the file with the rest of them.

Q. So far as you recall, did you take any action to [376] conceal that commission?

A. I did not. I think it is proof that the commission on the San Mateo property was entered into the books which were free and Mr. Carson had access to.

Q. I think you gave some testimony as to whether or not you had ever informed the Petitioner or his father with respect to commissions on purchases and sales of real property for Petitioner, and I call your attention to the fourth paragraph on Exhibit 19, and ask whether or not that doesn't contain a certain amount of information about the matter.

A. It does. I have already testified to that, Mr. Marcussen. I think you will find in the records that there was never any attempt to secrete any of the activities, my actions, during the time I was connected with the properties of Jan C. Lewenhaupt.

Q. Now, referring to the office at 369 Pine

(Testimony of E. C. La Montagne.)

Street in San Francisco, would you have engaged that office had it not been for the fact that it was needed in connection with the operations of the Petitioner?

Mr. Taylor: I object to the question as hypothetical and assuming a fact not in evidence.

The Court: Objection overruled. You may answer the question. [377]

The Witness: Mr. Marcussen, I can't answer that question, because I was already in possession of that office at the time of the termination, of the liquidation, of the Hastings Estate properties, and I was doing a real estate business in San Francisco as well as down the Peninsula, and I just naturally stayed there.

Q. (By Mr. Marcussen): Well, I call your attention to Exhibit N in which you make the statement concerning establishing a place of business for Petitioner in America, and you state, "This I did for him by maintaining the office in San Francisco."

A. Well, if I had had to pay the entire rent for the office out of my own pocket for my own business, it wouldn't have been worth it to me to stay there.

Q. In other words, the office was a joint office, as you testified.

Mr. Taylor: I object to the question as leading the witness.

The Court: Well, I don't think Mr. Marcussen has finished his question.

(Testimony of E. C. La Montagne.)

Q. (By Mr. Marcussen): Did you previously testify on your cross examination that this was a joint office?

Mr. Taylor: The record speaks for itself.

The Witness: Yes. [378]

Mr. Marcussen: I am just refreshing his recollection as to whether he did or not.

The Witness: I did.

Q. (By Mr. Marcussen): And the office would therefore not have been separately maintained by you?

Mr. Taylor: I object to that as leading the witness.

Q. (By Mr. Marcussen): Would the office be separately maintained by you to conduct your business, if you did not also function as an agent under this power of attorney for Petitioner?

Mr. Taylor: Same objection.

The Court: Objection overruled.

The Witness: The same answer to that that I gave a few moments ago, that if I had to pay rent for myself, I couldn't have afforded it. There wouldn't have been any office.

Q. Did you pay some of it out of your pocket? You shared in the expense of that office?

A. Yes. * * * * * [379]

E. C. LA MONTAGNE

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, was further examined and testified as follows:

(Testimony of E. C. La Montagne.)

Redirect Examination

* * * * * [544]

Q. (By Mr. Marcussen): Now, there was some testimony by Mr. Carson, in your absence, as to the extent of the time you devoted, and the services you performed under your power of attorney from the Petitioner.

Can you state to the Court approximately how much time you spent in managing Petitioner's affairs?

A. Mr. Marcussen, at this time, it is rather difficult to pin it down to any particular number of hours per day or per week, or anything like that, but I would estimate at least fifty percent of time; that is, per day, or per week, or per month, was devoted to this work.

Q. Was that true all during the period from 1941 through 1946? A. That is correct.

Q. And I think you have testified before, but, so we can clear the record and make certain about it, what did you do, in so far as keeping abreast of developments in economics and investments, both with respect to real property and securities?

A. Well, I was constantly, in regard to real property, I was constantly seeking the advice of other real estate brokers who had been in the business quite a considerable time.

I never entirely relied upon my own judgment in things. I discussed those problems with them. I discussed [546] the security market with security

(Testimony of E. C. La Montagne.)

brokers. I read reports on various companies that we were considering investing in their stocks.

I followed the stock market as it is shown on the stock boards around town.

Q. Do you recall whether a considerable portion of your time was devoted to such study?

A. It is hard to say just how much time could be expended in that, but I mean that was part of my duties and job, or whatever you want to call it, and I had to be able to advise Count Eric of the different positions of the market, what the companies were doing, and things of that type, from time to time.

Q. Did that have any relevance with respect to the general level of the real estate market and transactions that you might make on Petitioner's behalf?

A. It wouldn't be the position of the real estate market, any more than it would be the position of any one particular parcel of property.

* * * * * [547]

Q. Now, there was testimony yesterday to the effect that you received something like \$5,200 as a part of the \$12,000 fee that was paid by the Petitioner in connection with the sale of the Modesto property, and also from testimony relative to the \$3,375 fee that you received on, I think, the Sutter Street property. Can you tell me——

Mr. Taylor: That is El Camino, if you want the record straight.

(Testimony of E. C. La Montagne.)

Mr. Marcussen: Thank you. The El Camino property.

Q. I think you testified that it was customary, among real estate brokers, to split fees in that manner. Can you [549] elaborate on your statement?

A. Well, it is common practice. Real Estate brokers split fees with one another.

Q. Suppose you, as a real estate broker, had a certain piece of property for sale, and were authorized to sell it in the ordinary course of the real estate brokerage business, and then that piece of property was sold by some other agent.

Can you state generally what the custom is, with respect to the distribution of the fee for the sale?

A. Generally, it is split between the two brokers.

Q. Is that common knowledge?

A. That is common knowledge.

Q. And, in handling the sale of the Modesto property, and receiving the fee of \$5,200 that has been mentioned in the evidence, did you regard that transaction in somewhat the same light as the transaction I described in my previous question?

A. I did. I presume, at that time, I was a little vague yesterday, and sort of taken by surprise on the thing. That is probably the case, Mr. Marcussen.

However, I would like to have entered in the record at this time that, in any transaction that I made for the affairs of Jan Casimir Lewenhaupt,

(Testimony of E. C. La Montagne.)

where the property was purchased or sold, that prior to the consummation of that sale, I never entered into any discussion with the broker. [550] the other broker, or anybody, as to the distribution of any commission. That came after the confirmation had been made.

Q. In your correspondence with Count Eric, relative to the pros and cons of selling the Modesto property, did the possibility that you might receive part of the fee, or split the fee with the agent who actually handled the sale, did that possibility at all influence your judgment in recommending the sale of the property?

A. None whatever, Mr. Marcussen, because I do not believe that I ever urged Count Eric to confirm the sale to me. I merely placed before him the facts as they existed, pertaining to the amount of money to be received from the sale, the fact that no other person but the buyer could afford to pay that price for the property, that I considered that amount of money invested in one parcel of property in a small town as an uneven balance to an estate of that kind, but I do not believe that I ever urged him to sell it. I merely stated the facts.

Q. Except in so far as it appears in this correspondence?

A. Except as it appears in the correspondence, and I think the correspondence will bear that out.

Q. Now, did the splitting of the fee, shall we say, with you, involve any added expense for the Petitioner?

(Testimony of E. C. La Montagne.)

A. None whatsoever, because if I had not received it, [551] B. P. Oliver would have received the whole \$12,000. * * * * * [552]

Redirect Examination

Q. (By Mr. Marcussen): During the period of time that you were operating the trust—operating as trustee for the Hastings Estate—in the years 1941 and in 1942, and then during the period of time from 1942 to March 1945, when you were acting as liquidator of the Hastings Estate properties, is it your testimony that you devoted your time, during that period, to those duties and also to the duties, to the business of the Petitioner?

A. That is correct.

Q. And I think, upon cross examination; you conceded to counsel, or I understood you to do so, that, during that period of time, you spent a little more time with the Hastings [563] Estate properties and the Hastings Trust, than you did on the Petitioner's property.

A. That is what I said.

Q. So that it was a little less than fifty percent? You did not mean to testify, did you, that the fifty percent of your time covered both Petitioner's business, and this other business that you were conducting during those years?

A. What I intended to imply, or to state, rather, was that, of the time I spent, after or subsequent to the termination of the Hastings Estate affairs, the affairs of the Hastings Trust prop-

(Testimony of E. C. La Montagne.)

erties, and I no longer had those duties to perform, that, after that period of time, I spent approximately fifty per cent of the time—I wouldn't say fifty per cent of twenty-four hours, but fifty per cent of my working hours were devoted, or approximately thereof, I can't say that I spent six or four or five hours per day, working on my own affairs, and four or five or six hours on the affairs of the Lewenhaupt properties.

I say that I spent approximately fifty per cent of my time in handling, in taking care of those affairs.

I might have spent one whole day doing it, and the next day spent no time at all.

Q. And the other fifty per cent of your time, after March 31, 1945, was spent how? On your other business?

A. On my real estate business. [564]

Q. Prior to March 31, 1945, the percentage was a little less than fifty per cent on Petitioner's business?

A. Yes, naturally there would be some days possibly when I might have two full days' work.

Q. You didn't mean to make that allocation?

A. That is right, the next time I might be doing my own personal affairs, for a couple of days. It is hard to distinguish. [565]

* * * * *

(Testimony of E. C. La Montagne.)

Redirect Examination

Q. (By Mr. Marcussen): Mr. La Montagne, will you state whether or not, in splitting the Modesto—the fee on the Modesto sale—you recognized any impropriety by virtue of the fact that you had a power of attorney from Petitioner?

A. I most certainly did not, Mr. Marcussen.

Q. Will you answer the same question with respect to your taking the fee on the purchase of the San Mateo property? [567]

A. In answer the same way. If I had felt that there was any impropriety in so doing, I most certainly would not have entered the commission in the books, showing that it had been paid to me, nor would I have been likely to have retained any records that would incriminate me in any way, shape, or form, on that sale of the Modesto property.

Mr. Marcussen: Thank you, that is all, Mr. La Montagne. * * * * * [568]

[Endorsed]: T.C.U.S. Filed May 7, 1951.

[Endorsed]: No. 14069. United States Court of Appeals for the Ninth Circuit. Jan Casimir Lewenhaupt, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: October 7, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14069

JAN CASIMIR LEWENHAUPT,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS TO BE RELIED
ON UPON REVIEW

Petitioner states that he intends to rely upon the following points upon the review of the decision of The Tax Court of the United States in the above-entitled cause:

1. The Tax Court erred in holding and deciding that petitioner's capital gain from the sale in 1946 of real property located in Modesto, California, was subject to United States income taxes.

2. The Tax Court erred in failing to hold and determine that petitioner's gain from the sale of said real property was exempt from United States income taxes under the Tax Convention between the United States and Sweden and Section 22(b)(7) of the Internal Revenue Code.

3. The Tax Court erred in holding and deciding that petitioner's activities during the calendar year 1946 constituted engaging in trade or business in

the United States and that petitioner was therefore taxable under the provisions of Section 211(b) of the Internal Revenue Code.

4. The Tax Court erred in failing to hold and determine that the petitioner had no "permanent establishment" within the meaning of the Tax Convention between the United States and Sweden, in the United States during the calendar year 1946.

5. The Tax Court erred in that its opinion and decision are contrary to the law and the regulations and are not supported by substantial evidence of record.

6. The Tax Court erred in ordering and deciding that there is a deficiency in petitioner's income tax of \$33,793.02 for the calendar year 1946 and in failing to decide the petitioner has overpaid his income taxes for the calendar year 1946 by the amount of \$4,345.95.

Dated: October 13, 1953, San Francisco, Calif.

/s/ SAMUEL TAYLOR,

/s/ WALTER G. SCHWARTZ,

Counsel for Petitioner

[Endorsed]: Filed Oct. 13, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION CONCERNING EXHIBITS

It is hereby stipulated between the parties to the above-styled cause, through their respective attorneys undersigned, subject to the approval of the Court, that exhibits 3-C through 10-J in the record herein may be referred to by either of the parties hereto in brief, appendix thereto, or oral argument and may be considered and relied upon by the Court, without inclusion in the printed record herein.

/s/ H. BRIAN HOLLAND,
Assistant Attorney General,
Attorney for the Respondent

/s/ WALTER G. SCHWARTZ,
Attorney for the Petitioner

[Endorsed]: Filed November 18, 1953. Paul P. O'Brien, Clerk.



No. 14,069

IN THE

United States Court of Appeals
For the Ninth Circuit

JAN CASIMIR LEWENHAUPT,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

On Petition for Review of the Decision of The
Tax Court of the United States.

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FILED

MAR 23 1954

PAUL P. O'BRIEN

CLERK

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No. 14,069

IN THE

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BRIEF FOR PETITIONER.

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Tax Court of the United States.**

OPINION BELOW.

The only previous opinion is that of The Tax Court of the United States promulgated April 23, 1953. The findings of fact and opinion of The Tax Court are reported at 20 T.C. 151.

JURISDICTION.

The appeal involves income taxes for the calendar year 1946 (R. 4-16). On May 6, 1949, the Commissioner of Internal Revenue mailed by registered mail to the petitioner (sometimes hereinafter referred to

as the "taxpayer") a notice of deficiency (R. 8-16). Within 90 days thereafter and on July 5, 1949 (R. 1), the petitioner filed a petition with The Tax Court of the United States for a redetermination of the deficiency set forth in said notice of deficiency, under the provisions of Section 272 of the Internal Revenue Code. On March 26, 1951, the petitioner's motion to file an amended petition was granted, and an amended petition was filed on that date (R. 2, 4-8). The decision of the Tax Court in the instant case was entered on June 12, 1953 (R. 3). Said decision determines a deficiency in petitioner's income taxes for the calendar year 1946 in the amount of \$33,793.02 (R. 95). Pursuant to Section 1141(b)(2) of the Internal Revenue Code, it has been stipulated by and between counsel for the petitioner and counsel for the Commissioner that the decision of the Tax Court in this case may be reviewed by the Court of Appeals for the Ninth Circuit (R. 98). The case was brought to this Court by a Petition for Review filed September 8, 1953 (R. 3, 96-98), pursuant to the provisions of Section 1141 and 1142 of the Internal Revenue Code.

STATEMENT OF THE CASE.

The facts found by The Tax Court (R. 71-83) may be summarized as follows:

From the date of petitioner's birth (April 1, 1916) to November, 1948, he was a non-resident alien and a resident and citizen of the Kingdom of Sweden.

Petitioner became a resident of the United States in November 1948. The petitioner was physically present in the United States during the calendar year 1946 only from November 20, 1946 to December 20, 1946. At no time prior to November 1948 did the petitioner perform any personal services within the United States. From 1941 through 1946, except for the periods during which he was in the Swedish Army, petitioner was engaged in the importing and exporting business in Sweden. During World War II, petitioner spent several periods in the Swedish Army, and for a portion of this time his regiment was located on the Northern border of Sweden, an isolated location with which communication was difficult. From about 1939 through 1945, petitioner was unable to leave Sweden to come to the United States. During the Russo-Finnish War, petitioner served as a volunteer in the Finnish Army. Petitioner owned no real estate in Europe in 1946 or in any of the years prior thereto (R. 72).

In 1874, petitioner's great-grandfather, Serranus Clinton Hastings, the first Chief Justice of California, created an inter vivos trust for the benefit of himself, his wife and their descendants. This trust, sometimes hereinafter referred to as the Hastings trust, terminated on June 2, 1942 when the last of the children of Judge Hastings died. At the time that this trust terminated, Clinton LaMontagne was the trustee. From June 2, 1942 to March 31, 1945, inclusive, LaMontagne acted as referee in the partition of the corpus of the trust. The corpus was

liquidated and distributed to the remaindermen in cash. The last of the distributions of corpus was made on or before March 31, 1945 (R. 72-73).

Prior to the calendar year 1941, petitioner owned no real or personal property in the United States. He was, however, the beneficiary of a trust established under the will of his mother, Azelea Caroline Lewenhaupt, hereinafter sometimes referred to as the Lewenhaupt trust, the corpus of which comprised four parcels of real property and securities in the United States. Petitioner's mother died in 1925. Under the provisions of the trust established by her will, the petitioner received the income therefrom until he attained the age of 25, at which time the trust terminated and the corpus was distributed to him. Petitioner attained the age of 25 years on April 1, 1941 (R. 73).

On January 28, 1941, the petitioner appointed LaMontagne, who was a resident of California, as his agent for the purpose of managing the personal and real property petitioner was to receive upon distribution of the assets of the Hastings and of the Lewenhaupt trusts. LaMontagne was a second cousin of the petitioner and had been a trustee of the Hastings trust. The power of attorney dated January 28, 1941, executed by the petitioner in favor of LaMontagne conferred broad general powers on LaMontagne to manage petitioner's affairs and property in the United States. On the same date, the petitioner executed a power of attorney with identical provisions in favor of his father, Count Eric Audley Hall

Lewenhaupt, who at all times material hereto was a resident of Great Britain (R. 73-74).

Petitioner gave LaMontagne a broad power of attorney so that he might be able to act for him in case both Sweden and the United Kingdom were cut off from the United States and so that he would have sufficient power to handle petitioner's funds should the funds of Swedish nationals be frozen in the United States. The funds of Norwegian and Danish nationals in the United States were frozen on April 10, 1940. The funds of Swedish nationals in the United States were frozen on June 14, 1941. Petitioner gave his father a power of attorney because it was feared that Sweden might be invaded or cut off from contact with the United States and England, so that he could no longer communicate with his father in England or with LaMontagne in the United States (R. 74).

From 1945 to the time of the trial of this proceeding, LaMontagne has been a real estate broker, licensed under the laws of California, and he has been engaged full time in the business of real estate brokerage and property management. He conducted this business from an office which he maintained at 369 Pine Street in San Francisco during 1946, as well as before that year; and during 1946, he also maintained an office at his home in Atherton, a suburb of San Francisco. Prior to 1945 the petitioner paid LaMontagne a fee for his services plus an amount to cover part of his office expense in San Francisco. In 1945 and 1946 LaMontagne received from the peti-

tioner an increased fee for his services but no separate sum as reimbursement for office expense. His compensation for 1946 was \$7,580.00 (R. 74-75).

It was understood among petitioner, his father and LaMontagne, that LaMontagne was to take no important action regarding petitioner's United States property, such as purchasing and selling real estate, without first consulting either petitioner or petitioner's father. Prior to taking any major action with respect to petitioner's property in the United States, LaMontagne would consult with petitioner's father and, where practicable, with petitioner. Prior to selling petitioner's Modesto real property, referred to hereinafter, LaMontagne sought and received Count Eric Lewenhaupt's approval of the proposed sale. LaMontagne corresponded frequently with Count Eric Lewenhaupt. They corresponded about once or twice a week during the period from April 1, 1941 to December 31, 1946, inclusive. LaMontagne furnished petitioner's father with monthly reports of petitioner's United States properties. Petitioner frequently corresponded with his father regarding his properties in the United States (R. 75).

The power of attorney given LaMontagne was revoked by the petitioner effective December 31, 1946 (R. 76).

All of the income from petitioner's United States real property and securities, after payment of the expenses thereof, was transmitted to petitioner and his father (R. 76).

The petitioner at one time or another during the calendar year 1946 held legal title to and owned only the following real property situated in the United States (R. 76):

(a) Lots 29, 30, 31 and 32 in Block 68, 10th and J Streets, Modesto, California, hereinafter referred to as "the Modesto property."

(b) 1786-90 San Jose Avenue, San Francisco, California, hereinafter referred to as "the San Jose Ave. property."

(c) 679-85 Sutter Street, San Francisco, California, hereinafter referred to as "the Sutter St. property."

(d) 114 West Poplar Avenue, San Mateo, California, hereinafter referred to as "the West Poplar property."

The approximate fair market values of the United States real properties owned by petitioner in 1946 were as follows (R. 77):

Modesto Property	\$240,000.00
Sutter Street Property	75,000.00
San Jose Avenue Property	22,000.00

The Modesto property consisted of a single structure containing several stores. This property was acquired by petitioner on April 1, 1941 upon termination of the Lewenhaupt trust created for his benefit under the will of his mother. The property was encumbered by a mortgage in the amount of \$24,500. On January 12, 1938, while it comprised a part of the corpus of the Lewenhaupt trust, the Modesto

property was leased to the Stelling Leasehold Corporation, a California corporation, for a 50-year term commencing January 1, 1938 and on January 12, 1938, petitioner executed an agreement in which he undertook to be bound by the lease. On December 20, 1945, petitioner through LaMontagne entered into an agreement with the Stelling Properties Corporation for the sale of the Modesto property to that corporation. LaMontagne communicated with petitioner's father before making the agreement and secured his approval thereof. Legal title to the Modesto property was transferred to the Stelling Properties Corporation on January 23, 1946. The long-term capital gain from the sale of the Modesto property was \$152,555.87 (R. 77-78).

The lease on the Modesto property was a so-called "net lease" under which the lessee paid all property taxes, all charges for utilities, all insurance; made all repairs, and took care of maintenance. Also, the lessee had the right to make alterations, additions and improvements, and he was permitted to sublease the property. Petitioner, accordingly, did not pay taxes, insurance, utilities charges, or expenses of maintenance, repairs, or janitor services (R. 78).

Petitioner through LaMontagne regularly made payments of interest upon the \$24,500 mortgage on the Modesto property, but he made no payment of principal until the date of the sale of that property. Petitioner through LaMontagne paid the mortgage in full upon the date of the sale of the property (R. 78).

The property at 1786-90 San Jose Avenue, San Francisco, consisted of a single structure containing three stores. Petitioner through LaMontagne acquired this property on October 24, 1941 in exchange for a parcel of real property acquired upon the termination in 1941 of the trust created under his mother's will. During 1946, all three stores were leased to various tenants under leases with terms of three years or more. On March 1, 1945, petitioner through LaMontagne leased the store at 1788 San Jose Avenue to a tenant on a month-to-month basis. This lease was operative from March 15, 1945 through February 28, 1946. A new lease was entered into with the same lessee on February 1, 1946, to be effective for a 3-year term commencing March 1, 1946. The lessee used this store as an electrical repair and radio shop. The store at 1786 San Jose Avenue was leased to a tenant from at least November 1941 through February 28, 1949, and was used as a beauty shop. On January 31, 1946, petitioner through LaMontagne leased this store to the same tenant to be effective for a 3-year term commencing February 1, 1946. The store at 1790 San Jose Avenue was leased to a tenant from at least November 1941 through December 1948 for use as a restaurant and tavern. The lease in effect during 1946 was for a three year and four month term. All of the leases in effect during 1946 provided that the tenants would pay all utility bills and would make certain repairs at their own expense, except repairs of heating, roof, walls, and other outside repairs (R. 78-79).

Petitioner through LaMontagne purchased the real property at 679-85 Sutter Street, San Francisco, on December 3, 1945 at a cost of \$79,645.36. This property comprised a building containing two stores and ten studios (which studios were leased as a unit). On October 10, 1945, prior to the purchase of this property by the petitioner through LaMontagne, the store at 679 Sutter Street had been leased by its then owner for a 3-year term for use as a cocktail lounge commencing October 1, 1945 and ending September 30, 1948. Under this lease, the monthly rental was \$300, or seven per cent of the gross receipts of the business, whichever was larger. The petitioner, or his agents, were authorized to examine the lessee's books of account in order to check upon the amount of rent due. On December 27, 1945, the petitioner through LaMontagne leased the store at 681 Sutter Street for a 3-year term commencing January 1, 1946 for use as a ladies' tailor shop. The remaining portion of the Sutter Street property, 683-5 Sutter Street, consisted of ten studios and a basement, which were leased as a unit. On December 27, 1945, petitioner through LaMontagne leased this portion of the property to a tenant for a 3-year term commencing January 1, 1946. The lessee was specifically granted the power to sublease any and all of the studios. This lease was in effect through December 31, 1949. All these leases provided that the lessees should pay all utilities charges and some expenses of repairs, except repairs of heating, roof, wall, and other outside repairs (R. 79-80).

On December 18, 1946, petitioner became the owner of real property located at 114 West Poplar Avenue, San Mateo, California, hereinafter referred to as the "West Poplar property." The cost of this property was \$29,500.00, and included the assumption of a mortgage in the amount of \$16,211.31. The improvements thereon comprised a residence. The property was vacant from December 18, 1946 to December 31, 1946, inclusive. During the calendar year 1947, the property was leased to a tenant on a month-to-month basis.

There was no mortgage or other indebtedness upon any of the real properties owned by the petitioner during the calendar year 1946 except the mortgage indebtedness on the Modesto and West Poplar properties referred to above.

The gross rentals received by petitioner from his United States real properties during the calendar year 1946, and the expenses thereof during 1946, were as follows:

	Modesto Property	San Jose Avenue Property	Sutter St. Property	Total
Gross Rentals	\$843.31	\$3,093.00	\$8,705.99	\$11,642.30
Taxes	—	277.66	2,541.02	2,818.68
Insurance	—	106.01	472.24	578.25
Maintenance and Repair	—	56.09	3,073.15	3,129.24
Interest	94.38	—	—	94.38
Depreciation	66.35	1,236.95	2,389.37	3,692.67
Net Rentals	682.58	416.29	230.21	1,329.08

On June 12, 1946, the petitioner through LaMontagne decided to purchase real property located at 100-104 South El Camino Real, San Mateo, California. This property is hereinafter referred to as "the El Camino Real property." On that date, he took an option upon said property, made a down payment of \$10,000.00 and paid a commission of \$3,375.00 thereon. On January 2, 1947, petitioner through LaMontagne exercised the option and acquired legal title to this property on that date. Petitioner neither received any rent nor paid nor incurred any expenses with regard to this property prior to January 1, 1947. The cost of this property was \$67,500.00. The improvements thereon comprised a single structure containing three stores. Prior to the acquisition of legal title to this property by petitioner, all three stores had been leased to different lessees by the then owner, each of said leases being for a 5-year term expiring on June 30, 1951. Petitioner still owned this property on December 31, 1947 (R. 82).

During 1946, petitioner owned United States securities with an approximate valuation of \$100,000.00. Except for cash in the bank, and a small amount of cash on hand, petitioner owned no other personal property in the United States during 1946 (R. 82-83).

LaMontagne, during the taxable year, devoted approximately 50 per cent of his time to the manage-

ment of the petitioner's properties and to the conduct of his affairs in the United States (R. 83).*

The Tax Court found that petitioner's activities during the calendar year 1946 connected with the ownership of real property located in the United States, and the management thereof through LaMontagne, constituted engaging in a business in the United States (R. 83). Petitioner, as is discussed *infra* in this Brief, disagrees with his "finding of fact" of the Court, which is actually a conclusion of law.

QUESTIONS PRESENTED.

The only question presented is whether the long-term capital gain realized by petitioner, a citizen and resident of Sweden, during the calendar year 1946 upon the sale of certain real property located in the United States is subject to United States income taxes. Exemption is claimed by the petitioner on two independent grounds. Petitioner maintains and respondent denies that:

1. The gain in question is exempt from United States income taxes by the Tax Convention between

*Petitioner does not agree with this finding, which was based solely upon LaMontagne's own self-serving testimony (R. 154, 159) to justify his compensation of \$7,580 for 1946 (R. 74-75) plus a commission of \$5,250 on the sale of the Modesto property (R. 145-146) and a commission of \$3,375 on the purchase of the El Camino property (R. 132). A reasonable fee for the services rendered by him for that year, according to a disinterested expert witness, would have been about \$300 (\$260 for the general management of the properties plus \$40 for the renewal of two leases) (R. 102-113).

the United States and Sweden and Section 22(b)(7) of the Internal Revenue Code.

2. The petitioner (who was admittedly a non-resident alien during the calendar year 1946) was not engaged in trade or business within the United States within the meaning of Section 211 of the Internal Revenue Code during the calendar year 1946, and that therefore, under Section 211 of the Internal Revenue Code, the gain in question is not subject to United States income taxes.

SPECIFICATION OF ERRORS RELIED UPON.

The petitioner's specification of errors relied upon is set out in full in his Statement of Points to be Relied on upon Review (R. 161-162). Petitioner adheres to these errors as grounds for reversal on this appeal. These errors may be summarized as follows:

1. The Tax Court erred in holding and deciding that petitioner's capital gain from the sale in 1946 of real property located in Modesto, California, was subject to United States income taxes.

2. The Tax Court erred in failing to hold and determine that petitioner's gain from the sale of said real property was exempt from United States income taxes under the Tax Convention between the United States and Sweden and Section 22(b)(7) of the Internal Revenue Code.

3. The Tax Court erred in holding and deciding that petitioner's activities during the calendar year

1946 constituted engaging in trade or business in the United States and that petitioner was therefore taxable under the provisions of Section 211(b) of the Internal Revenue Code.

4. The Tax Court erred in failing to hold and determine that the petitioner had no "permanent establishment" within the meaning of the Tax Convention between the United States and Sweden, in the United States during the calendar year 1946.

ARGUMENT.

I.

THE TAX COURT ERRED IN FAILING TO HOLD THAT PETITIONER'S CAPITAL GAIN FROM THE SALE IN 1946 OF CERTAIN UNITED STATES REAL PROPERTY IS EXEMPT FROM UNITED STATES INCOME TAXES UNDER THE TAX CONVENTION BETWEEN THE UNITED STATES AND SWEDEN AND SECTION 22(b)(7) OF THE INTERNAL REVENUE CODE.

During the calendar year 1946, petitioner realized a long-term capital gain from the sale of certain real property located in the United States. Section 22(b)(7) of the Internal Revenue Code* exempts from United States income taxes income of any kind "to the extent required by any treaty obligation of the United States." Article IX of the Tax Convention between the United States and Sweden, effective January 1, 1940, exempts residents of Sweden from United States income taxes upon gains derived in the

*This section, together with other pertinent statutes, treaties and regulations, is included in the Appendix to this Brief.

United States from the sale or exchange of capital assets, provided such Swedish resident has no permanent establishment in the United States. A Tax Convention such as the one here referred to is, of course, a “treaty” within the meaning of Section 22(b)(7) of the Internal Revenue Code, I.T. 4019, 1950-2 C.B. 58. Unless petitioner, who during 1946 was a resident and citizen of Sweden, had a “permanent establishment” in the United States during 1946, under the clear wording of the Tax Convention the gain in question is specifically exempted from United States income taxes. Despite this, the Tax Court held the gain in question subject to United States income taxes. In so doing, that Court committed a clear error of law and its decision should be reversed by this Court.

A. Petitioner had no “permanent establishment” in the United States during 1946.

It is clear that during 1946 petitioner did not have a “permanent establishment” in the United States within the meaning of the Tax Convention. Section 1(a) of the Protocol to the Swedish Tax Convention and Section 25.2 of TD 4975 (the regulations applicable to the Swedish Tax Convention), 1940-2 C.B. 43, both define the term “permanent establishment” as follows:

“(a) The term ‘permanent establishment’ includes branches, mines and oil wells, plantations, factories, workshops, warehouses, offices, agencies, installations and other fixed places of business *of an enterprise* but does not include the casual or

temporary use of merely storage facilities. . . .”
[Emphasis supplied]

That section of the regulations further provides:

“(b) The term ‘enterprise’ means any *commercial* or *industrial* undertaking whether conducted by an individual, partnership, corporation, or any other entity. It includes such activities as manufacturing, merchandising, mining, banking and insurance. *It does not include the operation of, or the trading in, real property located in the United States.*” [Emphasis supplied.]

Thus, in order to have a “permanent establishment” in the United States, there must be an “enterprise.” The term “enterprise” is specifically defined as excluding the operation of or the trading in real property located in the United States. Hence, petitioner in the instant case did not conduct any “enterprise” in the United States, and therefore could not have a “permanent establishment” in this country.

In order to have a “permanent establishment” in the United States, more is necessary than merely “being engaged in trade or business” in this country. This is demonstrated by the Report of the Subcommittee on Executive D, Seventy-Ninth Congress, First Session (a Convention between the United States and the United Kingdom for the Avoidance of Double Taxation of Income, Etc.) dated June 30, 1945, which was made a part of the Report of the Senate Committee on Foreign Relations on the United Kingdom Tax

Convention (Executive Report No. 6, 79th Cong., 1st Sess., July 3, 1945).^{*} This report provides:

“With respect to the taxation of capital gains, where the alien is found to be resident in the United States he is under existing law taxed on his income from all sources, including his capital gains, but where he is found to be a mere transient, or sojourner, or for other reasons not resident in the United States, he is not taxable on his capital transactions unless he is engaged in trade or business in the United States. The convention does not disturb the existing residence principle but does contain some modification of taxation on the basis of being engaged in trade or business, in that the test prescribed in the convention is whether the alien has a permanent establishment (branch, agency, or other fixed place of business) in the United States as distinguished from being engaged in trade or business therein. Although an alien having a permanent establishment in the United States would in nearly all cases be engaged in business therein, certain cases could arise where he could engage in trade or business without having a permanent establishment and in such instances he would be exempt from tax on capital gains * * *”

* * * * *

“* * * As above indicated, there may be certain cases falling in between the test of being engaged in trade or business and having a permanent establishment where the convention is more liberal than existing law, but there are other com-

^{*}This Report is reproduced at 514 CCII Standard Federal Tax Reports, paragraph 4922.03.

pensating factors and no such technical conflict exists where the test of taxation is residence. Moreover, the same provisions found in the British convention are now in effect under the conventions with Canada, Sweden, and France.”

That the ownership and operation of real property in the United States does not constitute a permanent establishment in this country is made clear by the texts of several of the tax treaties. Article IX(1) of the Tax Convention between the United States and Belgium provides:

“Rentals or royalties from real property or in respect of the operation of mines, quarries or other natural resources shall be taxable only in the Contracting State in which such property, mines, quarries or other natural resources are situated. A resident of Belgium, or a corporation or other juridical person created or organized in Belgium deriving such rentals or royalties from sources within the United States may elect for any taxable year to be subject to United States tax as if such resident, corporation or entity were engaged in trade or business within the United States through a permanent establishment therein in such taxable year.”

Similar provisions are contained in the Tax Conventions between the United States and the Netherlands (Article X) and New Zealand (Article VII). If the ownership and operation of real property in the United States constituted a permanent establishment in this country, the above-cited provisions would be superfluous.

The Tax Court made no finding as to whether or not petitioner had a permanent establishment in the United States in 1946. This failure to make such a material finding of itself, petitioner submits, warrants a vacation of the decision and a remand to make such finding, *McGah et al. v. Commissioner* (C.A. 9, 1952) 193 F.2d 662.

The Tax Court did, however, in its opinion discuss the meaning of the term “permanent establishment” (R. 90). The opinion is difficult to follow at this point, but the Court’s reasoning may perhaps be summarized as follows:

1. The terms “having a United States business or office” and “engaging in trade or business within the United States” are synonymous.

2. The term “permanent establishment” is substantially identical with the meaning of words “United States business or office.”

3. The petitioner, the Tax Court found, was “engaged in trade or business within the United States” in 1946.

4. Therefore, the Tax Court implies, the petitioner had a “permanent establishment” in the United States, and hence the gain is not exempt under the Swedish Tax Convention.

If any one of the three premises is incorrect, the Tax Court’s conclusion falls. Petitioner submits that he was *not* “engaged in trade or business within the United States” in 1946 (see Part II of this Brief).

However, even if petitioner were so engaged, the Court's conclusion would not follow. Under the Tax Convention and the regulations thereunder, only an "enterprise" may have a permanent establishment, and the operating of, or even trading in, real property does not constitute an enterprise. Hence it would follow that an alien individual operating United States real estate might well have an office in this country or might even be engaging in business herein without having a permanent establishment in the United States. Congress, in Executive Report No. 6, quoted *supra*, pages 18-19.

Until 1942, Section 211 of the Internal Revenue Code provided the same treatment for nonresident aliens whether they were "engaged in trade or business in the United States" or "had an office or place of business in the United States." Congress found that some alien corporations and individuals attempted to establish that they had a United States office although they were not engaged in business in this country. For this reason, Congress in 1942 removed the alternative test of having a United States office and made the taxation of aliens depend on whether or not they were engaged in trade or business in the United States. (See Senate Report No. 1631, 77th Congress, 2d Session, 1942-2 C. B. 504 at 605.) Hence, the Tax Court is incorrect in assuming that "having a United States business or office" (the pre-1942 wording of Section 211) is synonymous with "engaging in trade or business within the United

States" (the present wording of Section 211). Therefore, an alien engaged in trade or business in the United States does not automatically have a permanent establishment in this country. The Tax Court erred in so assuming. The petitioner had no permanent establishment in the United States in 1946, and the Tax Court erred in failing to so find and hold.

B. The Commissioner's Regulations Excluding Capital Gains from the Sale of Real Property from the Benefit of the Capital Gains Exemption of the Swedish Tax Treaty Are Invalid.

Since then, petitioner did not have a permanent establishment in the United States during 1946, it seems quite clear from the Convention itself that the capital gain realized from the sale of his United States real property in 1946 would be exempt from United States income taxes.

However, the Commissioner's regulations under the Swedish Tax Convention attempt to exclude from the benefits of the exemption capital gains derived from the sale of real property located in the United States. Section 25.10 of these regulations (T.D. 4975, 1940-2 C.B. 43) reads as follows::

"Sec. 25.10. *Capital Gains*.—Under Article IX of the convention, gain derived from the sale or exchange of capital assets (*other than real property*) within the United States by a nonresident alien individual resident in Sweden or by a Swedish corporation or other entity is exempt from Federal income tax unless such individual, corporation, or other entity has a permanent

establishment in the United States. With respect to real property, see section 25.6 of these regulations.” [Emphasis supplied]

No such exclusion of real property from the benefits of the capital gain exemption appears in Article IX or elsewhere in the Convention itself.

Article V of the Convention reads as follows:

“Income of whatever nature derived from real property, including gains derived from the sale of such property, but not including interest from mortgages or bonds secured by real property, shall be taxable only in the contracting State in which the real property is situated.”

Article V is in no way inconsistent with Article IX of the Convention. As applied to the sale of real property by a Swedish resident in the United States, Article V merely prohibits Sweden from taxing such gain. It does not of itself subject such gain to tax by the United States, contrary to the provisions of Article IX which exempts from United States income tax, capital gains realized by a Swedish citizen and resident in the United States.

The obvious intent of the Tax Convention was to exempt capital gains from the sale of real property from both Swedish and United States income taxes, except where the seller had a permanent establishment in the United States. Such capital gains realized during 1946 by a Swedish resident not engaged in trade or business in the United States would clearly

be exempt from both Swedish and United States income taxes. Article V of the Tax Convention forbids Sweden from taxing such gains, whereas such gains are not subject to taxation by the United States under the provisions of Section 211(a) of the Internal Revenue Code.* It was the aim of several of the Tax Conventions (including the Swedish Tax Convention) to have the taxability by the United States of capital gains of nonresident aliens turn on whether or not the nonresident alien had a permanent establishment in the United States, and thus to abandon (as to nonresident aliens covered by such Tax Conventions) the test of Section 211 of the Internal Revenue Code, which makes taxability depend on whether or not the nonresident alien was engaged in trade or business within the United States. This is shown by the Report of the Sub-committee on Executive D, Seventy-Ninth Congress, First Session (a Convention between the United States and the United Kingdom for the Avoidance of Double Taxation of Income, Etc.) dated June 30, 1945, which was made a part of the Report of the Senate Committee on Foreign Relations on the United Kingdom Tax Convention (Executive Report No. 6, 79th Cong. 1st Sess., July 3, 1945). The pertinent provisions of this report are quoted on pages 18-19, *supra* of this Brief.

It is well established that the words of a treaty must be taken in their ordinary meaning, *Factor v. Laubenheimer* (1935) 290 U.S. 276; *Santovincenzo v.*

*As applicable to years prior to 1950.

Egan (1931) 284 U.S. 30. As the Supreme Court said in *United States v. D'Auerville et al.* (1850) 10 Howard 609 at 623, "compacts between governments or nations, like those between individuals, should be interpreted according to the natural, fair and received acceptation of the terms in which they are expressed." It seems clear then that the phrase "Gains * * * from the sale or exchange of capital assets" as used in the Convention means all such gains, including such gains from the sales of real property.

Numerous Supreme Court cases have established the rule that treaties are to be liberally construed so as to enlarge rather than to restrict rights that may be claimed under them. In *Asakura v. Seattle* (1924) 265 US 332, a city ordinance required a pawnbroker to be licensed and prohibited the issuance of such licenses to non-citizens. A treaty between the United States and Japan provided that "The citizens or subjects of each of the high contracting parties shall have the liberty to enter, travel and reside in the territories of the other to carry on trade, * * *" The Court held that plaintiff, a Japanese citizen, was entitled to a license, stating:

"It remains to be considered whether the business of pawnbroker is 'trade' within the meaning of the treaty. Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein v. Lynham*, 100 U.S. 483, 487; *Geofrey v. Riggs*,

133 U.S. 258, 271; *Tucker v. Alexandroff*, 183 U.S. 424, 437 * * * There is nothing in the character of the business of pawnbroker which requires it to be excluded from the field covered * * *, and it may be held that such business is 'trade' within the meaning of the treaty."

In *Bacardi Corporation of America v. Domenech* (1940) 311 US 150, the Court said:

"According to the accepted canon, we should construe the treaty liberally to give effect to the purpose which animates it. Even where a provision of a treaty *barely* admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, *the more liberal interpretation is to be preferred.*" [Emphasis supplied.]

Thus the term "property" as used in treaties has been repeatedly held to comprehend every species of title, inchoate or perfected, including executory as well as executed rights, *Smith v. United States* (1836) 10 Pet. 326; *Strother v. Luccas* (1838) 12 Pet. 410; *Morton v. Nebraska* (1875) 21 Wall. 660; *Bryan v. Kennett* (1885) 113 U.S. 179.

In *Todok v. Union State Bank* (1930) 281 US 449, the Court dealt with a treaty between the United States and Norway which provided that subjects of either nation could freely dispose of their "goods and effects" ("fonds et biens" in the French text of the treaty). The Court held that real estate was within the protection of the treaty.

Among the numerous other cases in which the Supreme Court has held that treaty obligations must be liberally construed, are the following:

Factor v. Laubenheimer (1933) 290 US 276;

Jordan v. Tashiro (1928) 278 US 123;

Nielsen v. Johnson (1929) 279 US 47;

Valentine v. United States ex rel. Neidecker
(1937) 299 US 5.

In the instant case, a construction of the Swedish Convention to the effect that the term "Gain * * * from the sale or exchange of capital assets" includes such gains derived from the sale of real property is more than "barely" admissible; such a construction is almost inevitable. Petitioner, therefore, submits that his capital gain realized in 1946 from the sale of real property is exempt from United States income taxation under the provisions of the Swedish Tax Convention.

The Commissioner's regulations T.D. 4975, Sec. 25.10, which seek to exclude capital gains from the sale of real property from the exemption accorded to capital gains under the Swedish Tax Treaty are inconsistent with the Treaty and hence are invalid.

The Courts have never hesitated to invalidate Treasury Department Regulations which go beyond the intended scope of the statute, or which introduce qualifications or limitations not contained in the statute itself.

In *Manhattan General Equipment Co. v. Commissioner* (1935), 297 U.S. 129, such a regulation was held

to be invalid. Under the Revenue Act of 1926, reorganizations taking the form of spin-offs were under some circumstances nontaxable. The law further provided that in such a case, the basis of the original stock "shall be apportioned, under rules and regulations prescribed by the Commissioner with the approval of the Secretary, between such [original] stock and the stock or securities distributed." Article 1599 of Treasury Department Regulation 69, as originally promulgated, provided that:

"* * * The portion of the cost or other basis of the old shares of stock to be attributed to the shares of new stock shall in no case exceed the fair market value of such shares as of the time of their distribution."

The Court held that the regulation thus promulgated was invalid, stating:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch v. Tilden Co.*, 265 U.S. 315, 320-322; *Miller v. United States*, 294 U.S. 435, 439-440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. *International Ry. Co. v. Davidson*, 257 U.S. 506, 514. The orig-

inal regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable.”

To the same effect is *Bingham Trust v. Commissioner* (1945) 325 U.S. 365. That case involved Section 23(a)(2) of the Internal Revenue Code, which permits the deduction of “ordinary and necessary expenses paid or incurred * * * for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.” The Commissioner’s regulations (Regulations 103, Sec. 19.23 (a)-15) as originally promulgated denied deduction of litigation expenses unless they were incurred to produce income. The Supreme Court held that this attempted limitation by the regulations was invalid.

A similar result was reached in *Burnet v. Marston* (C.A. D.C. 1932) 57 F.2d 611, aff’g (1929) 18 B.T.A. 558. In that case, the taxpayer had for many years been a member of a partnership engaged in the business of investment banking. In 1920 the partnership was dissolved and liquidation of its outstanding liabilities commenced. In 1922, the taxpayer made large payments in liquidating these liabilities and as a result suffered a loss which he attempted to carry forward to 1923. The Court held that he could do so although he was not in the investment banking business during either the loss year or the carry-forward year, and despite regulations to the contrary.

The Court said:

“Art. 1601, of Treasury Regulations 62, promulgated under the 1921 Act, reads in part as follows: ‘*Net losses, definition and computation.* The term “net loss” as used in the statute (Sec. 204) means only a net loss resulting from the operation *during the taxable year* of any trade or business regularly carried on by the taxpayer.
* * *

“It will be observed that this regulation is in the language of the statute, except that the words ‘*during the taxable year*’ have been interpolated.

“The Commissioner contends that Sec. 204 limits the right to carry over net losses into succeeding years to taxpayers regularly engaged in a trade or business during the taxable year in which the loss was liquidated. He does not deny that the taxpayer in the present case suffered a loss as claimed; nor does he deny that the taxpayer’s liability had become fixed in 1920 at the time of the dissolution of the partnership. On the other hand, the taxpayer contends, and the Board ruled, that under Sec. 204 it is sufficient if the loss resulted from the operation of the trade or business, whether the taxpayer was so engaged during a particular year or not.

“Sec. 204, being a relief measure, should ‘be construed liberally in favor of the taxpayers to give the relief it was intended to provide.’ *Bonwit Teller & Co. v. United States*, 283 U.S. 258, 263; *United States v. Merriam*, 263 U.S. 179, 187; *Bowers v. N.Y. & Albany Lighterage Co.*, 273 U.S. 346, 350; *United States v. Updike*, 281 U.S. 489, 496; *Burnet v. Niagara Brewing Co.*, 282

U.S. 648, 654. While the Commissioner was clothed with authority to promulgate regulations, he was not authorized to add to or take from the plain language of the statute, for 'where the intent is plain, nothing is left to construction.' *United States v. Fisher*, 2 Cranch 358, 386. A regulation in conflict with the terms of an unambiguous statute will not be sustained. *Campbell v. Galeno Chemical Co.*, 281 U.S. 599, 610. 'It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material.' *United States v. Tanner*, 147 U.S. 661, 663. Where a statute is clear and free from all ambiguity, the letter of it is not to be disregarded in favor of a mere presumption as to what is the policy of the government, even though it may be the settled practice of an executive department. *St. Paul, M. & M.R. Co. v. Phelps*, 137 U.S. 528.

"Sec. 204 of the Act of 1921 was intended to permit taxpayers who sustained large losses in one year to spread these losses over two succeeding years, provided only that the losses resulted from the operation of a trade or business regularly carried on by the taxpayer. That the taxpayer's loss in the present case resulted from the operation of a trade or business regularly carried on by Blair & Company is conceded. The mere fact that he paid that loss in 1922 instead of in 1920 did not deprive him of the benefit of Sec. 204. Had Congress so intended, the words 'during the taxable year,' supplied by the Commissioner in his regulation, would have been incorporated into the statute."

In *Todok v. Union State Bank* (1930) 281 U.S. 449, the protection granted in a treaty between the United States and Norway to “goods and effects” (“fonds et biens” in the French text of the treaty) was held to comprehend real estate, despite an opinion to the contrary by the Attorney General, 1 Ops. Atty. Gen. 275.

There is no inconsistency or ambiguity in the Swedish Tax Convention to be interpreted by the regulations. The Convention clearly and unambiguously exempts from United States income taxes gains from the sales of capital assets in United States by a Swedish resident. Where, as here, a statute (or treaty provision) is clear and unambiguous, “there is no power to amend it by regulation,” *Koshland v. Helvering* (1936) 298 U.S. 441; *J. F. Johnson Lumber Co.* (1944) 3 T. C. 1160.

This Court invalidated Treasury Department regulations under circumstances similar to those of the present case in *Commissioner v. Mills* (C.A. 9, 1950) 183 F. 2d 32, and *Rickenberg v. Commissioner* (C.A. 9, 1949) 177 F.2d 114, *cert. denied* 338 U.S. 449.

Phillips in his text *United States Taxation of Non-resident Aliens and Foreign Corporations* (1952), page 303, after pointing out that the regulations under the Swedish Convention exclude real property from the term “capital assets”, states:

“This appears to be an unwarranted exclusion, as Article V merely indicates where sales of real property are taxable when they are taxable, and

Article IX excludes from tax those sales or exchanges of U. S. real property in which the U. S. real property is a capital asset under *I.R.C.* 117."

Had the drafters of the treaty so intended, the phrase "except capital gains from the sale of real property" supplied by the Commissioner in his regulation, would have been incorporated into the treaty itself as was in effect done in the case of the Tax Convention between the United States and France. Articles 2 and 7 of that Convention correspond to Article V of the Swedish Tax Convention and provide that income and gains from real property are taxable only in the country where the land is situated. Article 11 of the French Convention corresponds generally with Article IX of the Swedish Convention; however, instead of dealing with *all* capital gains, the French Convention is limited to "Gains derived * * * from the sale or exchange of stocks, securities or commodities." Thus, when it was intended not to exempt capital gains from real property from United States income taxation, the Convention specifically so provided.

Both the United Kingdom Tax Convention (Article XIV) and the Canadian Tax Convention (Article VIII) contain provisions corresponding to Article IX of the Swedish Tax Convention. However, the Commissioner's regulations for those two Conventions do not seek to exclude from the definition of capital gains, gains derived from the sale of real property, Section 7.523, T.D. 5569, 1947-2 C.B. 100 (United Kingdom) and Section 7.29, T.D. 5206, 1943 C.B. 526 (Canada).

This further demonstrates the inconsistency and invalidity of the Commissioner's attempt to make such exclusion in the case of the Swedish Convention.

II.

THE TAX COURT ERRED IN FINDING AND HOLDING THAT PETITIONER WAS ENGAGED IN TRADE OR BUSINESS WITHIN THE UNITED STATES DURING 1946.

If, as petitioner contends, he was not engaged in trade or business within the United States during 1946, his capital gain from the sale of his United States real property in that year is not subject to United States income taxes.*

The Tax Court, resting its decision solely on petitioner's "activities with respect to certain parcels of improved real estate" (R. 92), held that petitioner was so engaged and that the capital gain in question was subject to United States income taxes. The facts relating to petitioner's United States real properties are set forth at some length in the Tax Court's findings of fact (R. 71-83). These facts are summarized in petitioner's Statement of the Case, *supra*.**

*If not so engaged, a nonresident alien, prior to the amendment of Section 211 of the Code by the Revenue Act of 1950, was subject to United States income taxes only on "fixed or determinable annual or periodical income." Capital gains do not constitute "fixed or determinable annual or periodical income," Regulations 111, Sections 29.143-2, 29.211-7; Regulations 118, Sections 39.143-2, 39.211-7.

**As is there noted, petitioner disagrees with the finding that Mr. LaMontagne devoted approximately 50% of his time "to the management of the petitioner's properties and to the conduct of his affairs in the United States."

Petitioner neither paid for nor furnished any janitorial services or utilities for any of the real properties owned by him during the year 1946. These properties required very little effort to manage. They were leased, generally speaking, on relatively long-term leases, chiefly to tenants who had occupied the premises for a considerable length of time. Mr. Richard E. Holl, the first vice-president of Baldwin & Howell, "one of the oldest and largest [real estate firms] in Northern California," and head of the Property Management Department of that firm, testified that his firm managed petitioner's United States real properties during 1947 at a fee of \$30.00 a month. The properties during that year consisted of the stores on San Jose Avenue, the stores and studios on Sutter Street, and three stores acquired in 1947 located at 104 South El Camino Real, San Mateo, California. He testified that his firm would have charged \$260.00 for managing petitioner's real properties during 1946, together with a fee of \$40.00 for effecting two renewals of leases during 1946 (R. 102-113). He further testified, as to the management of petitioner's real properties in the United States:

"In this case, there was very little to do. The stores were all leased, and it was just a matter of collecting the rentals, so we put a minimum of 2½ per cent of the gross receipts, in round figures, \$30.00 a month." (R. 105.)

Mr. Holl also testified that this fee represented the standard minimum property management fee of about

2½ per cent of the gross rentals charged by his company and by other real estate firms (R. 107-108).

GCM 18835, 1937-2 CB 141, states that:

“... the mere ownership of real property in the United States by a nonresident alien individual or foreign corporation does not in itself constitute engaging in trade or business within this country.”

GCM 18835 further provides that to constitute engaging in trade or business, the activities must go beyond “the mere receipt of income from property, and the payment of organization and administration expenses incidental to the receipt and distribution thereof.”

In *Evelyn M. L. Neill* (1942) 46 BTA 197, a non-resident alien had income from the United States from rentals paid by the lessee of certain real property. The building was operated and maintained by the lessee. Taxpayer's attorneys paid interest on a mortgage on the property, paid insurance premiums, and made other unspecified miscellaneous payments. The Commissioner contended that taxpayer was *not* engaged in trade or business in the United States, and the Board upheld this contention, stating:

“... The ownership of this property by petitioner is no more a business activity carried on within the United States than her ownership of stocks or bonds of American companies held for her by an American agent. Cf. *Higgins v. Commissioner*, 312 U.S. 212. We think the rule is settled that the mere ownership of property from

which income is drawn does not constitute the carrying on of business within the purview of the cited section [Sec. 211(b)]. *McCoach v. Minchill & Schuylkill Haven Railroad Co.*, 228 U.S. 295; *Stafford Owners, Inc. v. United States*, 39 Fed. (2d) 743."

The same result was reached in *Elizabeth L. M. Barbour* (1944) 3 TCM 216. On termination of a trust created by her grandmother, the taxpayer, a nonresident alien, acquired certain real and personal property including substantial securities on which she received dividends and several one-family dwellings and an undivided one-third interest in a two-family dwelling. All of the taxpayer's real and personal property including her securities was managed by a law firm under powers of attorney. The Tax Court stated:

"... Among their activities in connection with their management of petitioner's real properties in the United States, said firm, since February 8, 1938, has collected the rents thereof, arranged for leases of the premises, supervised the painting and repair of the buildings situated thereon, inspected said real property from time to time, supervised the various alterations requested by tenants and which were required to keep the properties rented, and arranged for insurance on the properties ..."

Several of the tax treaties also demonstrate that the ownership and operation of United States real property does not constitute the engaging in trade

or business in the United States within the meaning of Section 211 of the Code. Article IX(1) of the Tax Convention between the United States and the United Kingdom (reproduced in T.D. 5569, 1947-2 C.B. 100) provides:

"The rate of United States tax on royalties in respect of the operation of mines or quarries or of other extraction of natural resources, and on rentals from real property or from an interest in such property, derived from sources within the United States by a resident of the United Kingdom who is subject to United Kingdom tax with respect to such royalties or rentals and not engaged in trade or business in the United States, shall not exceed 15 percent: *Provided that any such resident may elect for any taxable year to be subject to United States tax as if such resident were engaged in trade or business in the United States.*" [Italics supplied.]

If owning and renting real property in the United States constituted engaging in trade or business in this country, the quoted provision would be superfluous and meaningless.

The term "engaged in trade or business," as used in Section 211 of the Code, is synonymous with the term "carrying on or doing business" as used in the sections which formerly imposed the capital stock tax, GCM 18835, 1937-2 C.B. 141; GCM 17014, XV-2 C.B. 317. In *Lewellyn v. Pittsburgh, B. & L. E. R. Co.* (C. A. 3, 1915), 222 Fed. 177, the Court stated:

"... Therefore, the expression 'engaged in trade or business' means the same thing as 'carry-

ing on business,' and the latter expression has the same meaning as 'doing business.' The three expressions either separately or connectedly convey the idea of progression, continuity, or sustained activities."

In GCM 17014, *supra*, it was stated (XV-2, C.B. 320):

"That the expressions ['engaged in trade or business' and 'carrying on or doing business'] are used synonymously is borne out also by reference to such cases as *McCoach v. Minchill Ry. Co.* (228 U.S., 295), *Von Baumbach v. Sargent Land Co.* (242 U.S., 503), *Edwards v. Chile Copper Co.* (270 U.S., 452), and cases cited therein."

The cases under the capital stock tax are fully in accord with the *Neill* and *Barbour* cases. These cases clearly demonstrate that the petitioner in the instant case was not engaged in trade or business within the United States. Brief summaries of the pertinent cases under the capital stock tax follow:

Stafford Owners, Inc. v. United States (Ct. Cl., 1930) 39 Fed. 2d 743. A corporation which owned a co-operative apartment house, all but one of the tenants of which were shareholders, was held not to be carrying on business for the purposes of the capital stock tax. The corporation received its income by assessments on each of the shareholders. The corporation managed the apartment house, paying for janitorial services, light, heat, water, insurance, taxes, interest and repairs.

Kingkade Hotel Co. v. Jones (W.D. Okla., 1939) 30 F. Supp. 508, appeal dismissed (C.A. 10, 1940) 108 F.2d 1015. A corporation was held not to be doing business where it owned three hotel properties, and it did no business other than receiving rentals, paying taxes, interest and insurance, and providing for its mortgaged indebtedness.

Midwest Steel Corp. v. O'Toole (W.D. Pa., 1940) 41-1 USTC Par. 9143. A corporation was held not to be doing business where it owned a 1,000 acre tract of land with summer cottages. It rented the summer cottages to various tenants under one-year leases. These leases were negotiated and signed by a local agent to whom the corporation paid a commission. The corporation also paid for the services of a caretaker.

Winn & Russell, Inc. v. U. S. (W.D. Wash., 1944) 44-1 USTC Par. 9321. A corporation was held not to be doing business when it had leased its warehouse to another corporation. Under the lease the corporation received a stipulated rent plus a percentage of the lessee's profits and was obligated to make certain repairs which it did.

Similar results have been reached by the New York courts under a statute imposing a tax upon the net income of "any trade, business or occupation conducted or engaged in by an individual" or an entity other than a corporation. In *People v. Graves* (1940) 283 NY 383, 28 NE 2d 881, the tenants in common of nine parcels of improved real property held for income purposes were held *not* to fall within the pro-

visions of that tax act. The Court of Appeals of New York stated:

“When used in tax statutes similar to that involved in the case at bar, ‘business’ or ‘doing business’ connote something more than the ownership of property and the receipt of income derived from property. *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, 37 S. Ct. 201, 61 L.Ed. 460; *McCoach v. Minehill & Schuylkill Haven R. R. Co.*, 228 U.S. 295, 33 S. Ct. 419, 57 L.Ed. 842; *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389, Ann. Cas. 1912B, 1312; *United States v. Peabody Co.*, 6 Cir., 104 F.2d 267; *Foss v. Com’r of Internal Revenue*, 1 Cir., 75 Fed.2d 326; *Washburn v. Com’r of Internal Revenue*, 8 Cir., 51 F.2d 949. Cf. *People ex rel. Manila Electric R. R. & Light Corp. v. Knapp*, 229 N.Y. 502, 508-511, 128 N.E. 892. Although the very nature of the case does not permit an exact formula by which to determine when the activities of a property owner amount to the doing of business, there has been evolved the principle which distinguishes between a passive and an active owner or investor. One who allocates the active administration of the properties to others and himself performs only such acts as are appropriate to safeguard his ownership, is to be distinguished from one who himself actively participates in administering the management of the properties. The question is one which depends upon the facts of the particular case. *Von Baumbach v. Sargent Land Co.*, supra, 242 U.S. at page 516, 37 S.Ct. 201, 61 L.Ed. 460. Many factors are to be considered, but no one is of itself decisive. Thus, in the *Foss* case, the court considered

whether the owner maintained his own office in connection with the properties, the amount of time which was devoted, whether he employed someone else or himself did the work which could be done by an employee, etc. In the case at bar, appellants maintained no office of their own. The oldest brother spent about one day a week in protecting the investment and an agent was employed who took active charge of caring for the properties, negotiating leases, etc. . . .”

The same result was reached under a similar taxing act in *People v. Browne* (Sup. Ct. App. Div. 3d Dept., 1944) 52 N.Y.S. 2d 822, 268 App. Div. 596, aff'd per curiam (1945) 294 N.Y. 834, 62 N.E. 2d 390. In that case, the management by executors of 81 separate parcels of real estate owned by the estate of a decedent did not constitute “any trade, business or occupation conducted or engaged in” within the meaning of the tax act. The Appellate Court said:

“The secondary question of whether the ownership and management of the realty constituted a business, either before or after decedent's death, within the meaning of Article 16-A of the Tax Law, poses a different problem. Conceivably one who is engaged in buying and selling real property for trading purposes might well be considered as engaged in a business within the meaning of the statute. The same may be said of stocks and bonds. But it can hardly be said that one is so engaged in business who holds stocks and bonds merely as an investment for income purposes. While the analogy may not be perfect the same principle should apply to real estate.

Business implies something more than merely the ownership and management of real property for income purposes. *People ex rel. Nauss v. Graves*, 283 N.Y. 383, 28 N.E. 2d 881. Each case of course must be decided in the light of its own circumstances. Realtors point to the size of decedent's real estate holdings, and the amount of income derived therefrom, as proof that the management of such property was really a business. The amount involved is not a test, unless arbitrarily made so by statute. Otherwise, any sizeable investment for income purposes would constitute a business within the meaning of the act. It does not appear from the record here that for the period embraced within the 1935 return realtors did aught but manage the realty as an income producing investment. They were therefore not engaged, insofar as such property was concerned, in a business under the statute. . . ."

The state courts have uniformly reached the same conclusion under numerous Workmen's Compensation Acts imposing liability where the employer "carries on a business or occupation." Thus, in *Billmeyer v. Sanford* (1929) 177 Minn. 465, 225 N.W. 426, a woman had for many years owned two vacant lots and four other parcels on which were buildings which accommodated eight or nine tenants. She employed an individual to repair broken steps and storm windows and to do some other odd jobs. It was held that she did not "carry on a business or occupation" within the meaning of the Compensation Act.

The same result was reached in *Clausen v. Dinnebeil* (1940) 125 N.J.L. 223, 15 A. 2d 205, where the court said:

“ . . . Looking after his own property—six houses—and collecting the rent of same, as well as making occasional repairs, can hardly be considered a business. . . .”

The same result has been reached in this state, *Ford v. Ind. Accident Com.* (1921) 53 Cal. App. 542, 200 Pac. 667. In that case, “Petitioner owned several storerooms and flats which she kept in repair and let to tenants.” The court held that petitioner was not engaged in trade or business, stating:

“ . . . where an individual invests his money in a house or houses which as owner he lets for profit, and at irregular times when demanded has labor performed in the repair thereof, he is not engaged in the prosecution of a trade or business, within the meaning of the act . . .”

Among the numerous other cases holding that the rental of one or more properties does not constitute engaging in trade or business are the following:

Kaplan v. Gaskill (1922) 108 Neb. 455, 187

N.W. 943 (two or three houses and a store);

Sturman v. Ind. Com. of Wisconsin (1930) 203

Wisc. 190, 232 N.W. 864 (five houses which the owner rented “and caused to be cleaned and repaired”);

Klonowski v. Crescent Paper Box Mfg. Co.

(1920) 217 Ill. App. 150 (factory building leased to a manufacturer);

Setter v. Wilson (1934) 140 Kan. 447, 37 P. 2d 50 (two stores and basement);

Taylor v. Seney (1935) 52 Ohio App. 79, 3 N.E. 2d 374 (three apartment buildings managed by a rental agency for a percentage of the rent, with a part-time janitor in each);

Lauzier v. Ind. Accident Com. (1919) 43 Cal. App. 725, 185 Pac. 870 (four small houses).

Thus, state courts have consistently held that the ownership and operation of real property on a scale similar to petitioner's does not constitute engaging in a trade or business within the meaning of the Workmen's Compensation Acts, and that hence the owner of such property is not liable under such Acts. These holdings are especially persuasive in view of the well-established doctrine that Workmen's Compensation Acts are liberally construed so as to bring employers and employees within their scope. This doctrine is stated as follows in 71 *Corpus Juris* 351:

"In addition to cases holding that workmen's compensation acts should be given interpretation in favor of the employee, a number of cases hold that the acts should or must be construed fairly, reasonably, or liberally, in favor, or for the benefit, of employees or their dependents, all doubts as to the right to compensation being resolved in their favor, and all presumptions indulged being in their favor; and there are statutory provisions for a liberal construction in favor of employees injured."

Among the cases holding that such statutes should be liberally construed in favor of coverage thereunder are the following:

Huhn v. Foley Bros. (1946) 221 Minn. 279,
22 N.W. 2d 3;

Bollinger v. Wagaraw Bldg. Supply Co. (1939)
122 N.J.L. 512, 6 A. 2d 396;

*Pacific Employers Ins. Co. v. Ind. Accident
Com.* (1945) 26 Cal. 2d 286, 158 P. 2d 9;

Wilson v. Brown-McDonald Co. (1938) 134
Neb. 211, 278 N.W. 254;

Johnson v. Wisconsin Lumber & Supply Co.
(1931) 203 Wis. 304, 234 N.W. 506;

Scholl v. Industrial Commission (1937) 366 Ill.
588, 10 N.E. 2d 360;

Ellis v. Kroger Grocery & Baking Co. (1944)
159 Kan. 213, 152 P. 2d 860;

Industrial Commission v. Ahern (1928) 119
Ohio St. 41, 162 N.E. 272.

Thus, each of the jurisdictions cases from which are cited herein to the effect that the ownership and operation of real property does not constitute engaging in a trade or business has adopted a rule that Workmen's Compensation Acts are to be liberally construed in favor of the employee and in favor of coverage under the Acts. Had there been any reasonable ground for determining that such activities constituted engaging in a trade or business, the state courts would have so held in order to carry out the policy of such Acts. Their consistent refusal

to do so strongly supports petitioner's contention that his activities in the United States during 1946 do not constitute "engaging in trade or business" in this country within the common meaning of that phrase or within the meaning of Section 211 of the Code.

Petitioner therefore submits that his ownership and operation of real property in the United States during 1946 did not constitute engaging in trade or business in this country. This conclusion is supported by one of the Commissioner's own rulings, by cases arising under the sections of the Internal Revenue Code dealing with nonresident aliens, and by cases arising under various other statutes.

CONCLUSION.

The decision of the Tax Court is erroneous and should be reversed.

Dated, San Francisco, California,

March 19, 1954.

Respectfully submitted,

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(Appendix Follows.)



Appendix.

Appendix

INTERNAL REVENUE CODE.

“Sec. 22. Gross Income.

* * * * *

“(b) Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

“(7) Income Exempt Under Treaty.—Income of any kind, to the extent required by any treaty obligation of the United States;”

(26 U.S.C. 1946 ed., Sec. 22)

“Sec. 211. Tax on Nonresident Alien Individuals.*

“(a) No United States Business or Office.—

“(1) General Rule.—

“(A) Imposition of Tax.—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations,

*This section is quoted in the form in which it was applicable during the calendar year 1946. Section 211 was amended in several respects by the Revenue Act of 1950, but these amendments are applicable only to taxable years beginning after December 31, 1949.

remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 30 per centum of such amount, except that such rate shall be reduced, in the case of a resident of any country in North, Central, or South America, or in the West Indies, or of Newfoundland, to such rate (not less than 5 per centum) as may be provided by treaty with such country.

“(B) Cross Reference.—For inclusion in computation of tax of amount specified in shareholder’s consent, see section 28.

“(2) Aggregate More than \$15,400.—The tax imposed by paragraph (1) shall not apply to any individual if the aggregate amount received during the taxable year from the sources therein specified is more than \$15,400.

“(3) Residents of Certain Countries.—The provisions of paragraph (2) shall not apply to a resident of any country in North, Central, or South America, or in the West Indies, or of Newfoundland, so long as there is in effect with such country a treaty which provides otherwise.

“(b) United States Business or Office.—A non-resident alien individual engaged in trade or business in the United States shall be taxable without regard to the provisions of subsection (a). As used in this section, section 119, section 143, section 144, and section 231, the phrase ‘engaged in trade or business within the United States’ includes the performance of personal services within the United States at any

time within the taxable year, but does not include the performance of personal services for a non-resident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of ninety days during the taxable year and whose compensation for such service does not exceed in the aggregate of \$3,000. Such phrase does not include the effecting, through a resident broker, commission agent, or custodian, of transactions in the United States in commodities (if of a kind customarily consummated at such place, and if the alien, partnership, or corporation has no office or place of business in the United States at any time during the taxable year through which or by the direction of which such transactions in commodities are effected), or in stocks or securities.

“(c) No United States Business or Office and Gross Income of More than \$15,400.—A nonresident alien individual not engaged in trade or business within the United States who has a gross income for any taxable year of more than \$15,400 from the sources specified in subsection (a)(1), shall be taxable without regard to the provisions of subsection (a)(1), except that—

“(1) The gross income shall include only income from the sources specified in subsection (a)(1);

“(2) The deductions (other than the so-called ‘charitable deduction’ provided in section 213(c)) shall be allowed only if and to the extent that they are properly allocable to the gross income from the sources specified in subsection (a)(1);

“(3) The aggregate of the normal and surtax under sections 11 and 12 shall, in no case, be less than 30 per centum of the gross income from the sources specified in subsection (a)(1); and

“(4) This subsection shall not apply to a resident of any country in North, Central, or South America, or in the West Indies, or of Newfoundland, so long as there is in effect with such country a treaty which provides otherwise.”

(26 U.S.C. 1946 ed., Sec. 211.)

**TAX CONVENTION BETWEEN THE UNITED STATES
AND SWEDEN (Effective January 1, 1940).**

“Article V

Income of whatever nature derived from real property, including gains derived from the sale of such property, but not including interest from mortgages or bonds secured by real property, shall be taxable only in the contracting State in which the real property is situated.”

“Article IX

Gains derived in one of the contracting States from the sale or exchange of capital assets by a resident

or a corporation or other entity of the other contracting State shall be exempt from taxation in the former State, provided such resident or corporation or other entity has no permanent establishment in the former State.”

“Protocol

At the moment of signing the Convention for the avoidance of double taxation, and the establishment of rules of reciprocal administrative assistance in the case of income and other taxes, this day concluded between the United States of America and Sweden, the undersigned Plenipotentiaries have agreed that the following provisions shall form an integral part of the Convention:

“1. As used in this Convention:

“(a) The term ‘permanent establishment’ includes branches, mines and oil wells, plantations, factories, workshops, warehouses, offices, agencies, installations, and other fixed places of business of an enterprise but does not include the casual or temporary use of merely storage facilities. A permanent establishment of a subsidiary corporation shall not be deemed to be a permanent establishment of the parent corporation. When an enterprise of one of the contracting States carries on business in the other State through an employee or agent, established there, who has general authority to contract for his employer or principal, it shall be deemed to have a permanent establishment in the latter State. But the fact that

an enterprise of one of the contracting States has business dealings in the other State through a bona fide commission agent, broker or custodian shall be held to mean that such enterprise has a permanent establishment in the latter State. * * *"

**TAX CONVENTION BETWEEN THE UNITED STATES
AND CANADA (Proclaimed June 4, 1942).**

"Article VIII

Gains derived in one of the contracting States from the sale or exchange of capital assets by a resident or a corporation or other entity of the other contracting State shall be exempt from taxation in the former State, provided such resident or corporation or other entity has no permanent establishment in the former State."

**TAX CONVENTION BETWEEN THE UNITED STATES
AND FRANCE (Proclaimed January 5, 1945).**

"Article 2

Income from real property, including income from agricultural undertakings, shall be taxable only in the State in which such real property is situated."

"Article 7

Royalties from real property or in respect of the operation of mines, quarries or other natural resources shall be taxable only in the contracting State

in which such property, mines, quarries or other natural resources are situated.

“Royalties derived from within one of the contracting States by a resident or by a corporation or other entity of the other contracting State as consideration for the right to use copyrights, patents, secret processes and formulae, trade marks and other analogous rights shall be exempt from taxation in the former State, provided such resident, corporation or other entity does not have a permanent establishment there.”

“Article II

Gains derived in one of the contracting States from the sale or exchange of stocks, securities or commodities by a resident or a corporation or other entity of the other contracting State shall be exempt from taxation in the former State, provided such resident or corporation or other entity has no permanent establishment in the former State.”

TAX CONVENTION BETWEEN THE UNITED STATES AND THE UNITED KINGDOM (Proclaimed July 30, 1946).

“Article IX

(1) The rate of United States tax on royalties in respect of the operation of mines or quarries or of other extraction of natural resources, and on rentals from real property or from an interest in such property, derived from sources within the United States by a resident of the United Kingdom who is

subject to United Kingdom tax with respect to such royalties or rentals and not engaged in trade or business in the United States, shall not exceed 15 percent: Provided that any such resident may elect for any taxable year to be subject to United States tax as if such resident were engaged in trade or business in the United States."

"Article XIV

A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets."

TREASURY DECISION 4975, 1940-2 C.B. 43

(Regulations Promulgated under the Tax Convention with Sweden).

"Sec. 25.1. *Scope of regulations.*—

* * * * *

"The specific classes of income from sources within the United States exempt by reason of the convention from United States income tax are:

* * * * *

"(d) Gains derived from the sale or exchange of capital assets by a non-resident alien individual resident in Sweden, or by a Swedish corporation or other entity, having no permanent establishment in the United States (Article IX). * * *"

"Sec. 25.2. *Definitions.*—Any word or term used in these regulations which is defined in the convention shall be given the definition assigned to such word

or term in such convention. Any word or term used in these regulations which is not defined in the convention but is defined in the Internal Revenue Code shall be given the definition contained therein.

“As used in these regulations:

“(a) The term ‘permanent establishment’ includes branches, mines and oil wells, plantations, factories, workshops, warehouses, offices, agencies, installations and other fixed places of business of an enterprise but does not include the casual or temporary use of merely storage facilities. A Swedish parent corporation having a subsidiary corporation which latter corporation has a permanent establishment in the United States will not be deemed, by reason of such fact, to have itself a permanent establishment in the United State. A Swedish enterprise as defined in the convention carrying on business in the United States through an employee or agent, established in the United States, who has general authority to contract for his employer or principal, shall be deemed to have a permanent establishment in the United States. However, business dealings in the United States by a Swedish enterprise through a bona fide commission agent, broker, or custodian do not constitute a permanent establishment in the United States.

“(b) The term ‘enterprise’ means any commercial or industrial undertaking whether conducted by an individual, partnership, corporation, or any other entity. It includes such activities as manufacturing, merchandising, mining, banking, and insurance. It

does not include the operation of, or the trading in, real property located in the United States. It does not include the rendition of personal services. Hence, a nonresident alien individual, a resident of Sweden, rendering personal services within the United States, is not merely by reason of such services, engaged in an enterprise within the meaning of the convention and his liability to Federal income tax is unaffected by Article II of the convention. * * *

"Sec. 25.6. *Income from real property.*—Income of whatever nature derived by a nonresident alien individual resident in Sweden or by a Swedish corporation or other entity from real property situated in the United States, including gains derived from the sale of such property, is not exempt from taxation by the convention. The treatment of such income for taxation purposes is governed by those provisions of the Internal Revenue Code applicable generally to the taxation of nonresident aliens and foreign corporations. Interest derived from mortgages or bonds secured by real property does not constitute income from real property within the meaning of the convention but is subject to the provisions applicable to interest generally. See Article VIII of the convention and section 25.9 of these regulations."

* * * * *

"Sec. 25.10. *Capital gains.* Under Article IX of the convention, gain derived from the sale or exchange of capital assets (other than real property) within the United States by a nonresident alien individual

resident in Sweden or by a Swedish corporation or other entity is exempt from Federal income tax unless such individual, corporation, or other entity has a permanent establishment in the United States. With respect to real property, see section 25.6 of these regulations."

TREASURY DECISION 5006, 1943 C.B. 506

(Regulations Promulgated under the Tax Convention with Canada).

"Sec. 7.29. (a) *Capital gains*.—Under Article VIII of the Convention gain derived from the sale or exchange within the United States of capital assets by a nonresident alien individual resident in Canada or by a Canadian corporation, or other Canadian entity is exempt from Federal income tax unless such individual, corporation or other entity has a permanent establishment in the United States. As to what constitutes capital assets, see section 117, Internal Revenue Code, and section 19.117-1, Regulations 103. As to what constitutes a permanent establishment, see section 7.22 of these regulations."

TREASURY DECISION 5549, 1943-2 C.B. 100

(Regulations Promulgated under the Tax Convention with the United Kingdom).

"Sec. 7.523. *Capital gains*.—Under Article XIV of the convention, when read in association with Article II(2) of the convention, gains from the sale or exchange of capital assets by a nonresident alien individual who is a resident of the United Kingdom

or by a foreign corporation managed and controlled in the United Kingdom are, for taxable years beginning on or after January 1, 1945, exempt from Federal income tax unless such alien or corporation has a permanent establishment in the United States. As to what constitutes capital assets, see section 117, Internal Revenue Code. As to what constitutes a permanent establishment see section 7.515 of these regulations. If A, a nonresident alien individual who is a resident of the United Kingdom, performs personal services within the United States during the calendar year 1946 for a domestic employer, he is engaged in trade or business within the United States in such taxable year. Section 211(b), Internal Revenue Code. He carries on in that year no other business activity within the United States other than certain securities transactions upon a domestic stock exchange and maintained no office or other fixed place of business within the United States at any time during such year. A is not subject to Federal income tax upon his capital gains, if any, realized from his securities transactions. Likewise, a foreign corporation managed and controlled in the United Kingdom selling its products manufactured in the United Kingdom through a resident commission agent or broker in the United States and having certain securities transactions within the United States as its only other business activity therein is exempt from United States tax upon those capital gains, if any, arising from the securities transactions with the United States."

No. 14,069

IN THE

United States Court of Appeals
For the Ninth Circuit

JAN CASIMIR LEWENHAUPT,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of
The Tax Court of the United States.

REPLY BRIEF FOR PETITIONER.

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JAN CASIMIR LEWENHAUPT,

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COMMISSIONER OF INTERNAL REVENUE,

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On Petition for Review of the Decision of
The Tax Court of the United States.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

1. THE TAX COURT ERRED IN FAILING TO HOLD THAT PETITIONER'S CAPITAL GAIN FROM THE SALE IN 1946 OF CERTAIN UNITED STATES REAL PROPERTY IS EXEMPT FROM UNITED STATES INCOME TAXES UNDER THE TAX CONVENTION BETWEEN THE UNITED STATES AND SWEDEN AND UNDER SECTION 22(b)(7) OF THE INTERNAL REVENUE CODE.
 - A. Capital gain from the sale of real property located in the United States is exempted from United States income taxes under Article IX of the Tax Convention between the United States and Sweden.

Article IX of the Tax Convention between the United States and Sweden exempts residents of

Sweden from United States income taxes upon gains derived in the United States from the sale or exchange of capital assets, provided such Swedish resident has no permanent establishment in the United States (PB, App. iv-v).¹ The Commissioner's regulations under this Convention attempt to exclude from the benefits of the exemption capital gains derived from the sale of real property (PB 22, App. x-xi). Respondent attempts to justify these regulations by arguing that Article IX of the Swedish Convention must be read in conjunction with the remaining provisions of the Convention and existing revenue laws (RB 15 *et seq.*). Petitioner does not dispute this but submits that there is nothing in the treaty or its legislative history or in the Internal Revenue Code justifying the Commissioner's attempted amendment of Article IX of the Convention to exclude therefrom capital gains from the sale of real estate.

Respondent argues that it was the intent of the Convention that *all* income be taxed either in the United States or Sweden and that *no* income whatsoever escape taxation in both countries. This is demonstrably untrue. Under Section 211(a) of the Internal Revenue Code, as it existed at the time of promulgation of the Swedish Tax Convention in 1939, a non-resident alien neither engaged in trade or business in the United States nor having any office or place of business therein was *not* subject

¹Petitioner's Brief and Respondent's Brief in this case are herein referred to as "PB" and "RB" respectively.

to United States income taxes upon gains from the sale of capital assets in the United States, including real property constituting capital assets.² Notwithstanding the provisions of this Section, the framers of the Swedish Tax Convention in Article V thereof (PB, App. iv) provided that "gains derived from the sale of such [real] property . . . shall be taxable only in the contracting State in which the real property is situated." The Swedish Tax Convention thus forbade Sweden from taxing a Swedish citizen and resident upon gain derived by such resident from the sale of real property located in the United States. If such a Swedish resident had neither a business nor an office in the United States, and the real property in question was a capital asset, he was under Section 211(a) of the Internal Revenue Code exempt from United States income taxes upon such gain. Thus, under Article V of the Swedish Tax Convention and Section 211(a) of the Internal Revenue Code, a Swedish resident not engaged in trade or business in the United States and having no office or place of business herein was exempt from both Swedish and United States income taxes upon gain realized from the sale of United States real property if such

²Section 160(e) of the Revenue Act of 1942 amended Section 211(a) so as to grant the exemption from United States income taxes on capital gains to a non-resident alien not engaged in trade or business in the United States whether or not he had an office or place of business in this country. Section 213(a) of the Revenue Act of 1950 amended Section 211(a) to provide that capital gains of non-resident aliens derived from sources within the United States are under certain circumstances subject to United States income taxes.

property constituted a capital asset. Thus, even if Article IX of the Convention is to be interpreted in the manner contended for by Respondent, the Convention granted complete tax immunity to capital gain derived from the sale of United States real property by a Swedish resident without a United States office or business. Hence it cannot be said that escape of any type of income from tax by either country was never contemplated by the Swedish Tax Convention.

It was the manifest intention of Article IX of the Convention to extend the exemption from United States taxation for capital gains derived in the United States not only to non-resident Swedish aliens with neither United States businesses nor offices but also to non-resident Swedish aliens who even if they had a United States business or office did not have a "permanent establishment" within the United States. This is demonstrated by the Report of the Subcommittee on Executive D, Seventy-Ninth Congress, First Session (a Convention between the United States and the United Kingdom for the Avoidance of Double Taxation of Income, Etc.) dated June 30, 1945, which was made a part of the Report of the Senate Committee on Foreign Relations on the United Kingdom Tax Convention (Executive Report No. 6, 79th Cong., 1st Sess., July 3, 1945).³ This report provides:

"With respect to the taxation of capital gains,

³This Report is reproduced at 514 CCH Standard Federal Tax Reports, paragraph 4922.03 (1951).

where the alien is found to be resident in the United States he is under existing law taxed on his income from all sources, including his capital gains, but where he is found to be a mere transient, or sojourner, or for other reasons not resident in the United States, he is not taxable on his capital transactions unless he is engaged in trade or business in the United States. The convention does not disturb the existing residence principle but does contain some modification of taxation on the basis of being engaged in trade or business, in that the test prescribed in the convention is whether the alien has a permanent establishment (branch, agency, or other fixed place of business) in the United States as distinguished from being engaged in trade or business therein. Although an alien having a permanent establishment in the United States would in nearly all cases be engaged in business therein, *certain cases could arise where he could engage in trade or business without having a permanent establishment and in such instances he would be exempt from tax on capital gains * * **

“ * * As above indicated, there may be certain cases falling in between the test of being engaged in trade or business and having a permanent establishment where the convention is more liberal than existing law, but there are other compensating factors and no such technical conflict exists where the test of taxation is residence. Moreover, the same provisions found in the British convention are now in effect under the conventions with Canada, Sweden, and France.”*
[Italics supplied.]

Thus, Congress was fully aware that Article IX of the Swedish Tax Convention and the corresponding provisions of the Canadian, French and British Conventions liberalized the rule of Section 211(a) with respect to gains derived from the sale of capital assets located in the United States in that the test of "permanent establishment in the United States" was substituted for the test of "engaging in business" in the United States. The same exemption from United States taxes upon capital gains enjoyed under Section 211(a) of the Code by a non-resident alien not doing business in the United States was extended to non-resident aliens not having a permanent establishment in the United States by Article IX of the Swedish Convention and corresponding articles of certain other conventions. With respect to gains from the sale of United States real property constituting a capital asset, Swedish citizens not residing in this country and not engaged in business in the United States were exempt from both United States taxes (Section 211(a), Internal Revenue Code) and Swedish income taxes (Article V, Swedish Tax Convention). It was the expressed intent of Article IX of the Swedish Convention that the capital gains exemption from United States taxes available to non-resident Swedish citizens without a United States business be extended to non-resident Swedish citizens without a permanent establishment in the United States. This intent is frustrated, insofar as real property capital assets are concerned, by the Com-

missioner's regulations. Under the Commissioner's interpretation, a non-resident Swedish citizen deriving capital gain from the sale of United States real property is exempt from United States income tax under Section 211(a) if he has no United States business, but is not exempt if he has a United States business but no permanent establishment in this country despite the intent of the Swedish Convention to treat such Swedish citizens in the same manner in both cases.

There is no indication in the legislative history of the Swedish tax convention or elsewhere that capital gains from the sale of real property were not intended to be embraced within the provisions of Article IX of the Swedish Tax Convention. Had the drafters of the treaty so intended, the phrase "except capital gains from the sale of real property" (supplied by the Commissioner in his regulations under the Swedish Convention) or its equivalent would have been incorporated into the treaty itself. This was in effect done in the French Convention. Article 11 of the French Convention (PB, App. vii⁴) corresponds to Article IX of the Swedish Convention except that the exemption applies not to all capital gains but only to "Gains derived . . . from the sale or exchange of stocks, securities or commodities." On the other hand, Article VIII of the Canadian Tax Convention (PB, App. vi) is word for word the same

⁴Because of a misprint, the title of Article 11 of the French Convention appears as "Article II" in the Appendix to Petitioner's Brief (page vii).

as Article IX of the Swedish Convention, and Article XIV of the United Kingdom Tax Convention (PB, App. viii) is the same in substance. However, the Commissioner's regulations under these two conventions do not seek to exclude from the definition of capital gains, gains derived from the sale of real property, Section 7.29, T.D. 5206, 1943 C.B. 526 (Canada) (PB, App. xi) and Section 7.523, T.D. 5569, 1947-2 C.B. 100 (United Kingdom) (PB, App. xi-xii).

These Tax Conventions clearly demonstrate that when the framers wish to exclude capital gains derived from the sale of real property from the exemption accorded to other capital gains, they clearly so provided in the Convention itself, (as in the French Treaty) and when they used the term "gains derived from the sale or exchange of capital assets", they clearly meant to include gains from the sale or exchange of real property which constituted a capital asset (as in the Swedish, Canadian and United Kingdom Treaties). In the Canadian and United Kingdom Conventions, the Commissioner agreed with this interpretation; only with respect to the Swedish Convention has he attempted to deny the exemption afforded to capital gains to such gains from the sale of real property. In so doing, the Commissioner has attempted to amend the Convention, and his regulations to this effect should be treated as invalid.

Significantly, the Respondent in his Brief makes no effort to answer or dispute Petitioner's authorities

to the effect that treaties should be liberally construed so as to enlarge rather than to restrict rights that may be claimed under them (PB 24-32).

As above indicated, the Canadian and United Kingdom Tax Conventions have language identical or substantially similar in effect to that in Article IX of the Swedish Tax Convention. Under neither of these Conventions has the Commissioner contended that capital gain from the sale of real property is subject to tax. In the one tax convention where it was desired to tax capital gain from the sale of real property, such capital gain was expressly excluded from the exempt items (Article 11 of Tax Convention between the United States and France (PB, App. vii)). As a matter of policy and for ease in administration, the several tax conventions should be interpreted uniformly. The taxpayer's position here results in such uniform interpretation. The Commissioner's position engrafts an exception upon the uniform treatment of the various tax conventions and will result only in confusion.

For these reasons, the Tax Court erred in failing to hold that the petitioner's capital gain derived from the sale in 1946 of real property located in the United States was exempt from United States income taxes under Article IX of the Swedish Tax Convention.

B. Petitioner had no "permanent establishment" in the United States during 1946.

As pointed out in Petitioner's Brief (PB 16-22), the petitioner did not have a "permanent establish-

ment" in the United States during 1946 within the meaning of the Swedish Tax Convention, since only an "enterprise" may have a "permanent establishment" within the meaning of the Tax Convention, and the operation of or trading in real property located in the United States does not constitute an "enterprise". This has been the uniform interpretation of the term "permanent establishment" in other tax conventions. For example, the regulations to the United Kingdom Tax Convention, TD 5569, Section 7.515(a), 1947-2 C.B. 100, read in part as follows:

"... The term 'permanent establishment' as used in the Convention implies the active conduct therein of a business enterprise. The mere ownership, for example, of timber lands or warehouse in the United States by a United Kingdom enterprise does not mean that such enterprise has a permanent establishment therein."

Almost the identical wording appears in the regulations under the Netherlands Tax Convention, TD 5778, Section 7.853(a), 1950-1 C.B. 92, and in the regulations under the Danish Tax Convention, TD 5777, Section 7.953(a), 1950-1 C.B. 76, and the language of the regulations under the French Convention, TD 5499, Sections 7.413(a) and (b), 1946-1 C.B. 134, is nearly identical to that of the Swedish Convention regulations, TD 4975, Section 25.2(a) and (b), 1940-2 C.B. 43, quoted in Petitioner's Brief (PB App. viii-x).

In short, the term "permanent establishment" is under the Swedish and other Tax Conventions, uniformly interpreted to exclude the ownership or operation of real property in the United States. Since the taxpayer's activities in the United States cannot be considered to result in his having a "permanent establishment" in this country, the taxpayer is, under Article IX of the Swedish Convention, exempt from United States income taxes upon capital gains derived in this country.

C. The gain derived by taxpayer from the sale from United States real property constitutes "gain from the sale or exchange of capital assets" within the meaning of Article IX of the Swedish Tax Convention.

Respondent argues that the Modesto real property sold by the taxpayer was not a capital asset, but was "property used in the trade or business" of the taxpayer (RB 22-24). Petitioner submits that the property in question was a capital asset, but even assuming, without conceding, that it did not constitute a capital asset within the meaning of Section 117(a)(1) of the Internal Revenue Code, nevertheless, the gain from its sale constitutes a gain from the sale of a capital asset within the meaning of Section 117(j)(2) of the Code and such gain therefore qualifies for the exemption granted by the Swedish Tax Convention to "gains from the sale or exchange of capital assets". Section 117(j)(2) of the Internal Revenue Code provides in part as follows:

"If, during the taxable year, the recognized gains upon sales or exchanges of property used

in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than six months into other property or money, exceed the recognized losses from 'such sales, exchanges, and conversions, *such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months . . .*' [Italics supplied.]

Article IX of the Swedish Tax Convention exempts, under certain conditions, "gains . . . from the sale or exchange of capital assets" realized in the United States by a Swedish resident. The question then is whether gains which under Section 117(j)(2) of the Code are considered as "gains . . . from sales or exchanges of capital assets held for more than 6 months" qualify for an exemption granted to "gains . . . from the sale or exchange of capital assets".

This question has received an affirmative answer in *Wilson Line, Inc.* (1947) 8 T.C. 394.⁵ This case arose under the World War II excess profits tax law. Section 711(a)(1)(B) of the Code read as follows:

"(a) Taxable Years Beginning After December 31, 1939—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal tax net income, as de-

⁵The Commissioner has accepted this case by acquiescing therein, 1947-1 C. B. 4.

defined in section 13(a)(2), for such year except that the following adjustments shall be made:

(1) *Excess Profits Credit Computed Under Income Credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

(b) *Gains and Losses from Sales or Exchanges of Capital Assets.*—There shall be excluded gains and losses from sales or exchanges of capital assets held for more than 6 months;”

Section 711(a)(2)(D) contained the same exemption applicable to taxpayers using the invested capital method. Section 117(j) then existed in its present form.

In the *Wilson Line* case, taxpayer in 1942 sold certain parts which it had stored after dismantling its marine railway several years earlier. Taxpayer contended that the properties in question were either capital assets or were assets falling under Section 117(j) and that in either case the gain from the sale thereof should be excluded in computing its excess profits net income. This Court held:

“... the gain was from the sale of ‘property used in the trade or business’, as defined in section 117(j)(1), and income under section 117(j)(2), is to be considered as gain from the sale of capital assets held for more than six months.”

* * *

“We conclude that the gain on the sale of the marine railway should be excluded from excess profits net income.”

This Court thus held that 117(j) net gain qualified for an exemption applicable to "gains . . . from sales or exchanges of capital assets."

Furthermore, the 1950-1953 Excess Profits Tax Act contains the identical provision to those of section 711(a)(1)(B) and 711(a)(2)(D) of the World War II Act. Section 433(a)(1)(C) of the Code provides:

"(a) Taxable Years Ending After June 30, 1950.—The excess profits net income for any taxable year ending after June 30, 1950, shall be the normal-tax net income, as defined in section 13(a)(2), for such year increased or decreased by the following adjustments:

* * * * * *

"(C) Gains and Losses from Sales or Exchanges of Capital Assets.—There shall be excluded gains and losses from sales or exchanges of capital assets;"

The Commissioner's regulations specifically provided that 117(j) net gains are considered capital gains within the meaning of this exemption. Regulations 130, Section 40.433(a)-2(c) reads in part as follows:

"(c) Gains and losses from sales or exchanges of capital assets, whether long-term or short-term, are excluded under section 433(a)(1)(C) in determining excess profits net income. Such gains and losses are determined under the definitions contained in, and in the manner prescribed by, Section 117. Accordingly, excess profits net income is computed by decreasing normal-tax net income by the amount of the net capital gain

of the corporation. *Thus, if the gains of the corporation described in section 117(j) exceed the losses described in that section, such gains and losses are considered capital gains and losses, and are included in determining net capital gain for the purpose of the adjustment required by section 433(a)(1)(C).*" [Italics supplied.]

The Commissioner, both by acquiescing in the *Wilson Line* case and by promulgating the above-quoted regulations, has held that gains falling under section 117(j) qualify for an exemption granted to "gains from the sale or exchange of capital assets" in almost the identical language used in Article IX of the Swedish Tax Convention. The same interpretation should apply in the instant case. Such interpretation is of course required by section 117(j) itself which provides that 117(j) gains and losses "... shall be considered as gains and losses from sales or exchanges of capital assets held for more than six months . . ."

II. THE TAX COURT ERRED IN FINDING AND HOLDING THAT PETITIONER WAS ENGAGED IN TRADE OR BUSINESS WITHIN THE UNITED STATES DURING 1946.

Petitioner reiterates his alternative argument that he was not engaged in trade or business within the United States during 1946 and hence under the provisions of Section 211 of the Internal Revenue Code, his capital gain from the sale of his United States

real property in that year is not subject to United States income taxes (PB 34-47).

In arguing that Petitioner's activities constituted engaging in trade or business in the United States, respondent relies principally on the cases of *Pinchot v. Commissioner*, (C.A. 2, 1940) 111 F.2d 718 and *Eugene Higgins* (1939) 39 B.T.A. 100, aff'd (C.A. 2, 1940) 111 F.2d 795, aff'd (1941) 312 U.S. 212 (RB 27-28). The *Pinchot* case involved ungranted interests in eleven parcels of New York City real property, and the taxpayer's interest had a gross value of about one million dollars, and the *Higgins* case involved approximately twenty-six pieces of real estate in New York City with a value of about ten million dollars. It is clear that the taxpayers' operations in the *Pinchot* and *Higgins* cases were much greater in scope than those of petitioner in the instant case. Petitioner submits that under the cases cited in his Brief (PB 34-47), which include Federal tax cases as well as state cases, his activities in the United States during 1946 do not constitute "engaging in trade or business" and hence the gain here involved is exempt from United States income taxes under Section 211(a) of the Internal Revenue Code as well as under the Swedish Tax Convention.

CONCLUSION.

The decision of the Tax Court is erroneous and should be reversed.

Dated, San Francisco, California,
May 10, 1954.

Respectfully submitted,

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